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SUPREME COURT OF THE UNITED STATES

October Term, 1994

DONALD J. BLANDFORD **PETITIONER**

versus

UNITED STATES OF AMERICA **RESPONDENT**

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the petitioner denied due process of law when he was convicted in a Hobbs Act prosecution wherein he admitted receiving money from a lobbyist (but denied the money was a bribe) and the lobbyist testified that he did not ask the petitioner to do or refrain from doing anything in exchange for the money?

   (a) Do McCormick v. United States and Evans v. United States require a quid pro quo in a non-campaign contribution case, an issue which has split the Circuits?

   (b) Did the Sixth Circuit err in upholding an instruction on the quid pro quo which the Eleventh Circuit has held does not satisfy the quid pro quo requirement?

2. Was due process of law violated in a RICO prosecution where the "enterprise" was not separate from the pattern of racketeering activity and the "pattern" itself consisted of only two predicate acts, separated by five years, and not involving similar purposes, results, participants, victims, or methods of commission?

3. Did the sentencing guideline for "costs of incarceration" exceed the delegated statutory authority of the United States Sentencing Commission, an issue upon which the Circuits are divided?

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UNITED STATES OF AMERICA — RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully petitions that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on September 7, 1994.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, decided and filed on September 7, 1994, is reported at 33 F.3d 685 (6th Cir. 1994). A Petition for Rehearing, with suggestion for Rehearing en banc, was denied in an Order entered on December 1, 1994.

JURISDICTION

The United States District Court for the Eastern District of Kentucky entered Judgment against Blandford on July 27, 1993. A timely Notice of Appeal was filed with the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the Judgment in an Opinion rendered on September 7, 1994. The Sixth Circuit denied Blandford's Petition for Rehearing by Order entered December 1, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 and Supreme Court Rule 10.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be...deprived of life, liberty, or property without due process of law.

18 U.S.C. §1951 [Hobbs Act] provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> .....
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use

of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1962(c) [Racketeer Influenced and Corrupt Organizations] provides in pertinent part as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

United States Sentencing Guideline §5E1.2(i) [Fines for Individual Defendants] provides in pertinent part as follows:

> Notwithstanding of the provisions of the subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

STATEMENT OF THE CASE

The Petitioner, Donald J. Blandford, is the former Speaker of the Kentucky House of Representatives. In November 1992, Blandford was indicted on federal criminal charges by the grand jury for the Eastern District of Kentucky. Counts 1 and 2 charged both conspiracy and attempt to violate the Hobbs Act (18 U.S.C. §1951) in January - March 1992. Count 3 was a RICO claim (18 U.S.C. §1962(c)) [1st predicate act, either Count 1 or 2; predicates #2-#4, mail fraud counts relating to alleged misuse of campaign funds in 1984-86]. Count 4 (18 U.S.C. §1001) was a false statement count.

After a two-week jury trial, Blandford was acquitted of Count 1 and convicted of Counts 2, 3 and 4. On Count 3, the jury identified only two racketeering acts: Count 2 and predicate act #4 (mail fraud in 1987). On Count 3 - the highest offense for Guideline purposes - Blandford received a 64 month sentence followed by two years of supervised release; on Count 2, 64 months, concurrent with Count 3; on Count 4, 60 months, also concurrent with Count 3. Blandford was also ordered to pay a $10,000 fine, plus $108,356 for "costs of incarceration and supervision".

The charges against Blandford arose out of an FBI investigation into Kentucky legislative activities, code-named "Boptrot". Two lobbyists - John W. "Jay" Spurrier (a lobbyist for Kentucky Utilities and Chairman of the Kentucky Harness Racing Commission) and William McBee (former legislator, then lobbyist and a close friend of Blandford) - were involved in a scheme to extort money from Riverside Downs, a harness-racing track located in Henderson, Kentucky. Spurrier agreed, in exchange for money, to use his Commission position to improperly help Riverside Downs, a Florida outfit that was trying to establish itself on the Kentucky horseracing scene. Spurrier was unaware that his Riverside Downs "contact" was a government informant.

In January 1992, Spurrier was confronted by FBI agents right after paying $20,000 to Bruce Wilkinson (nephew of Kentucky's then-governor Wallace Wilkinson). The payment was meant to influence the Governor's appointment of an arbitrator in a dispute between Riverside Downs and rival thoroughbred track Ellis Park over allocation of televised inter-track wagering dates.[1] Spurrier agreed to cooperate with the FBI in a "sting"

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[1]Kentucky did not allow "off track" betting, but did allow a track without a live race to open for the purpose of accepting bets on a live race simulcast from another track in Kentucky.

operation. McBee, Spurrier's partner in the Riverside Downs scheme, was unaware that Spurrier was working with the FBI.

Spurrier told the FBI that he and McBee planned to approach various Kentucky legislators, including Blandford, to prevent the inclusion of any "breed-to-breed" provision in the "horse bill" in the upcoming 1992 legislative session[2]. This legislation would have prevented harness race tracks from simulcasting thoroughbred races, the latter being far more popular in Kentucky. Spurrier and McBee testified that Blandford was targeted because of his power as Speaker of the Kentucky House of Representatives.

In 1992, Governor Jones, a thoroughbred breeder, drafted his own Horse Bill, referred to later as the "Governor's Bill" by McBee. This Bill consisted of many parts for which McBee and Spurrier were legitimately lobbying for or against on behalf of Riverside Downs, the Harness Commission, and The Red Mile. The Red Mile was a harness track for which McBee was a registered lobbyist. All of the persons involved in the drafting of the Governor's bill, including lobbyists for thoroughbred interests, testified that there was never any effort to include "breed to breed" in the omnibus bill.

In January 1992, several legislators and lobbyists went to Florida during a break in the legislative session. The trip, sponsored by various lobbyists, had been a regular occurrence for several years. While in Florida, McBee gave Blandford $500, but said nothing about Riverside Downs or any legislation.

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[2] Every legislative session (every two years for 60 days) included a omnibus bill pertaining to horse racing matters. The horse bills originated, until 1992, out of a House Committee. The harness and thoroughbred interests were usually bitter rivals. Speaker Blandford had told both interests, several sessions back, that they must reach a consensus on any "horse bill" before he would allow the bill on the floor.

Both McBee and Blandford testified that they were close friends, and that McBee had given Blandford gifts on numerous occasions, including meals, drinks, entertainment, or money for those activities. Kentucky law did not prohibit outright gifts from a lobbyist to a legislator.

As part of an FBI-devised scenario, Blandford was then invited to a dinner (with both audio and video surveillance) on February 20, 1992, at Spurrier's hotel suite. Blandford's closest friends were invited. Spurrier was instructed to get McBee to give Blandford money and simultaneously to obtain Blandford's oral commitment against inclusion of breed-to-breed in the horse bill. McBee took Blandford to a back bedroom (equipped with only microphones), gave him $500, and told him it was from the "harness people". No legislation was ever mentioned.

McBee's flubbing of his lines led to a second FBI-sponsored dinner on March 11, 1992. Again, Blandford's closest friends were invited. McBee was again instructed by Spurrier to give money to Blandford while thanking him for his help in killing breed-to-breed[3]. The scenario, down to the exact language McBee was supposed to say, was developed by the FBI in consultation with federal prosecutors. Both audio and video surveillance equipment were set up in the bedroom this time.

McBee again failed to follow instructions. He gave Blandford money , but when Blandford asked "Well, what is that?" McBee said only "Harness people". Blandford responded with "Huh?" McBee then said "Your governor's taking care ... your governor's taking care of the bill" and "when I get it, I share...I share with my buddies". McBee later mentioned both

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[3]The Governor's Horse Bill had earlier that week been introduced by its House sponsor. It contained no "breed-to-breed" provision.

breed-to-breed ("ain't in there") and Riverside Downs ("you can't legislate them out of business"), along with other matters, such as a geologists-sponsored bill.

McBee testified that he did not ask for - nor did he receive - any promise or agreement from Blandford on either February 20 or March 11 regarding breed-to-breed legislation. McBee also testified that he was not giving money to Blandford based upon some prior agreement or promise by Blandford in regard to breed-to-breed.

Blandford's tendered instruction was patterned on McCormick v. United States, 500 U.S. 257 (1991). This required the jury to find that he "...attempted to obtain property from Mr. McBee or others, acting on behalf of Riverside Downs, in return for Mr. Blandford's promise to perform or not perform specific official acts or actions regarding proposed breed-to-breed legislation". [4]

The trial court rejected this proposed instruction, agreeing with the prosecutors that Evans v. United States, 504 U.S. ____, 119 L.Ed.2d 57 (1992) eliminated the quid pro quo requirement of McCormick. Blandford objected to the government's tendered instruction, later adopted by the trial court, which required the government only to prove:

> ... that the defendant intended to obtain property or a payment to which he was not entitled with the knowledge that the property or payment was being given in return for an official act or an exercise of his official authority in regard to

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[4]Blandford's motion for a judgment of acquittal, on the same theory, was overruled by the trial court and upheld by the Sixth Circuit.

legislation potentially including Breed to Breed provisions.

At trial and on appeal, Blandford argued that this Instruction allowed the jury to convict based solely upon his passive acceptance of money from McBee, without any proof of an agreement (either express or implied) by Blandford to do anything in exchange, i.e., a quid pro quo. Blandford argued that Evans extended the quid pro quo requirement of McCormick to all Hobbs Act prosecutions for extortion under color of official right, and that the trial court's Instruction failed to comply with either McCormick or Evans.

The United States contended on appeal that the trial court's Instruction was correct because it paralleled language from Evans ["...the government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts" (119 L.Ed. 2d at p. 72)]. The government backed off its trial position, however, and argued that this language "relaxed" the quid pro quo of McCormick. Both the government and the trial court ignored the context of the cited Evans sentence, which was the last sentence in a paragraph which addressed whether fulfillment of the quid pro quo (i.e., action) was an element of a Hobbs Act offense.

The Sixth Circuit held that Evans incorporated McCormick's quid pro quo, but did not extend it to a non-campaign contribution case such as Blandford's. Judge Nelson disagreed, writing that Evans extended the quid pro quo to this case, and that the instruction was erroneous but harmless error.[5] Even though the trial judge gave this instruction precisely

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[5]Judge Nelson cited lack of a specific objection to the omission of the word "specific" in the instruction, but otherwise

because he thought it accurately reflected Evans's elimination of the quid pro quo, the Sixth Circuit thought that the trial court erroneously believed Evans "controlled the case at bar"[6] in giving a quid pro quo instruction based on Evans. The Sixth Circuit held that Blandford received a quid pro quo instruction to which he was not otherwise entitled.(Op. 26)

The Sixth Circuit also upheld Blandford's RICO [18 U.S.C. §1962(c)] conviction. Predicate act 1 of the RICO count was the alleged Hobbs Act conduct in 1992; predicate acts 2-4 were mail fraud charges, based on information provided by Blandford's Chief Administrative Assistant, Buel Guy, concerning Blandford's alleged misuse of his House District 14 campaign funds in 1984, 1986, and 1987.

The "mailings" were duplicate copies of Blandford's campaign finance reports. Kentucky law required the original reports to be filed with the Kentucky Registry of Election Finance in Frankfort, Kentucky, with a duplicate copy filed with the County Clerk of the candidate's county of residence. The three mailings charged involved campaign funds paid to Gail Foley, who worked in the Speaker's office, and to Buel Guy. These expenditures were listed on the campaign finance reports as campaign-related. At trial, Blandford agreed that he had given money to Foley and Guy for personal needs, but testified that

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did not address the instruction's failure to address the "agreement or promise" element of a quid pro quo instruction. He also relied upon selected statements wherein the prosecutor linked the money to "specific" legislation. In his Petition for Rehearing, Blandford cited several other prosecution remarks wherein the jury was told that payments based upon Blandford's status or position was sufficient.

[6] All page references are to the Opinion set forth in the Appendix A.

he felt campaign funds could be used for this purpose since both Foley and Guy had worked extensively in his campaigns without compensation.[7] The "mail fraud" element originated in Guy's testimony that the duplicate copies of the campaign finance reports were ordinarily mailed from Frankfort (where the legislature met) to the County Clerk in Blandford's home county of Daviess.

Of the four RICO predicates charged, the jury identified only two racketeering acts: Count 2 (attempted Hobbs Act) and predicate act 4 (mail fraud arising out of Blandford's alleged June 1987 misuse of campaign funds). Count 2 occurred in 1992, and involved John Spurrier and William McBee, both lobbyists, allegedly bribing Blandford in his capacity as Speaker of the House. The mail fraud predicate was based on Blandford's alleged misuse of campaign funds from his House District 14 campaign treasury in June 1987. The participants were Blandford, Buel Guy (administrative assistant to the Speaker), and Gail Foley (who also worked in the Speaker's office). The alleged misuse was that Blandford gave Guy money from campaign funds for non-campaign-related activities.

Blandford argued that the two predicate acts were not sufficiently related to each other (or to the alleged "enterprise") to form a RICO pattern[8], nor was there any "continuity" between

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[7]Kentucky law did not then define for what purposes a campaign "expenditure" could be made. In 1993, the legislature amended the campaign finance statutes to define "allowable campaign expenditures" as excluding that "which would bestow a private pecuniary benefit".

[8] "... criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J., Inc. v. Northwestern Bell, 492 U.S. 229, 241 (1989).

the acts. Blandford also challenged the existence of an "enterprise" separate from the "pattern" which was, in turn, that he abused his "office" in two different ways. The enterprise charged in the indictment was the "Office of the Representative for House District 14 together with the individuals employed therein..." (Indictment, ¶ 18). The evidence at trial demonstrated there was no physical entity for the "Office" of House District 14, nor were there any "individuals employed therein".

Predicate act 1 involved Blandford's status as Speaker of the House, not his position as House District 14 representative. The participants, Spurrier and McBee, were lobbyists, not legislative employees. Predicate act 4 involved alleged misuse of campaign funds, and was based upon Blandford's position as treasurer of his campaign fund. This position was completely independent of his position as House District 14 Representative, or his status as Speaker of the House. There was no campaign fund or treasurer for the Speaker's office as that was selected by secret ballot of the membership. Neither of the predicate acts related to the alleged "enterprise".

Judge Guy, writing for the Sixth Circuit panel, upheld the sufficiency of the pattern, stating that the predicate acts were related because "... they had as their purpose the use of public office for personal benefit..." (Opinion, 38). Judge Guy cited his dissenting opinion in Vild v. Visconsi, 956 F.2d 560, 571 (6th Cir.) cert. denied 113 S.Ct. 99 (1992) as authority for the proposition that the H.J. Court meant to "craft a broad test of relatedness". Judge Quist dissented because the predicates were "widely separated in time" and "the means of commission, the victims, and the results are dissimilar". (Opinion, 64).

The majority panel in Vild rejected the "broad test of relatedness" advocated by Judge Guy in favor of a more narrow interpretation of the H.J. relatedness requirement. (Vild at 568). In his Petition for Rehearing, Blandford argued that, by adopting

the Vild dissent, the Sixth Circuit panel had raised the dissent to the law of the case, effectively overruling Vild.

The issues involved in this case were raised by Blandford at trial and during his appeal. The Sixth Circuit Opinion has created a split in Circuits on the Hobbs Act issue. The Opinion has also, on the RICO issue, erroneously construed H.J.Inc's "relatedness" definition as an expansion, rather than a limitation, on the pattern element. The Opinion further equates the "enterprise" as nothing more than the pattern of racketeering activity, contrary to Turkette.

REASONS FOR GRANTING THE WRIT

1. This Court Should Grant Certiorari To Resolve A Conflict Between The Sixth Circuit And Other Circuits On Whether Evans Extended The Quid Pro Quo of McCormick To Non-Campaign Contribution Cases; And If So, To Clarify Whether Evans Requires A Lessened Quid Pro Quo.

This Court held in McCormick v. United States, 500 U.S. _____, 114 L.Ed.2d 307 (1991), that a conviction for extortion "under color of official right" requires proof of an express agreement, or quid pro quo, if campaign contributions are involved. "[W]hatever ethical considerations and appearances may indicate", the Hobbs Act does not extend to legislators supporting legislation, shortly before or after campaign contributions were solicited or received. (114 L.Ed.2d at p. 325). This Court held that campaign contributions were illegal "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act". (Id. at p. 326). This Court left open the

question of whether this requirement extended to "other contexts, such as when an elected official receives gifts, meals, travel expenses or other items of value". (114 L.Ed.2d p.326, n. 10).

In Evans v. United States, 504 U.S. ____, 119 L.Ed.2d 57 (1992) (also a campaign contribution case), this Court granted certiorari to address whether an affirmative act of inducement by the public official is a necessary element of a Hobbs Act. In Evans, the petitioner accepted money from a real estate developer in the form of cash and a $1,000 check. This Court held that §1951 does not require that the public official initiate the transaction. 119 L.Ed.2d at 71. The petitioner in Evans further argued that performance of the agreement was an element of the offense. This Court rejected Evans' contention, holding that the instruction given [...if a public official demands or accepts money in exchange for a specific requested exercise of his or her official power...] adequately embodied McCormick's quid pro quo requirement:

> We reject petitioner's criticism of the instruction and conclude that it satisfies the quid pro quo requirement of McCormick v. United States (citation omitted), because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense....We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for

official acts[9]. 119 L.Ed.2d at 72. (emphasis added)

In his separate concurrence, Justice Kennedy noted that the underlying rationale of the Court's decision applies not only in campaign contribution cases, but all §1951 "official right" prosecutions. 119 L.Ed.2d at 79.

Subsequent cases have assumed that Evans extended the quid pro quo beyond the campaign contribution context, but appear to disagree on whether a McCormick-style express quid pro quo is required. Compare United States v. Garcia, 992 F.2d 409, 414 (2d Cir. l993)(a "modified" version) and United States v. Coyne, 4 F.3d 100, 114 (2d Cir. 1993) (Evans does not require "explicit" promise) with United States v. Davis, 30 F.3d 108 (11th Cir. 1994)("Explicit promise by a public official to act or not act is an element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect"); United States v. Martinez, 14 F.3d 543 (11th Cir. 1992)(Instruction that "passive acceptance" of money is sufficient "if the official knows he has been offered the payment in exchange for the exercise of his official power" does not satisfy the quid pro quo requirement) and United States v. Ferguson, 1993 Lexis 22373 (4th Cir. 1993)(p.8)("Nothing in these instructions suggests that anything other than an explicit promise by the defendant to perform or not perform an official act would suffice to convict him").

Blandford argued at trial that Evans extended the quid pro quo requirement of McCormick to all §1951 prosecutions under color of official right, while the United States maintained that Evans did not require any proof of a quid pro quo in a non-

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[9] The instruction given in Blandford's case paralleled this language from Evans.

campaign contribution case. The trial court adopted the government's position that Evans did not require proof of a quid pro quo. On appeal, the United States then took the position that Evans (which it mischaracterized as a non-campaign contribution case) "relaxed" the quid pro quo requirement in a non-campaign contribution case.

The Sixth Circuit panel concluded that Evans incorporated McCormick's quid pro quo, but did not extend it to a non-campaign contribution case such as Blandford's. (p. 23). However, the panel conceded that the Eleventh, Fourth and Second Circuits have held that Evans "establishes a modified or relaxed quid pro quo standard to be applied in a non-campaign contribution case". (p. 20).

Writing for the majority, Judge Guy held that, even though Blandford was not entitled to a quid pro quo instruction, he nonetheless got one since the instruction "tracked the relevant portion of the holding in Evans [a campaign contribution case], quoting directly therefrom." (p. 25). In his Petition for Rehearing, Blandford pointed out the Instruction tracked Evans' language regarding completion of the quid pro quo. The Instruction as given did **not** incorporate the language or the elements of the quid pro quo instruction which was actually upheld in Evans.

The Sixth Circuit's decision herein directly conflicts with two reported decisions of the Eleventh Circuit in non-campaign contribution cases similar to Blandford's. In United States v. Martinez, 14 F.3d 543 (11th Cir. 1992), the Eleventh Circuit rejected an instruction similar to the Evans language relied upon by Sixth Circuit. The instruction given was that mere "passive acceptance" of money was sufficient "if the official knows he had been offered the payment in exchange for the exercise of his official power . . ." (at 552). The Court held that this did not satisfy the quid pro quo of McCormick and Evans (at 553).

In United States v. Davis, 30 F.3d 108 (11th Cir. 1994), the Court vacated upon rehearing the defendant legislator's conviction, holding that the trial court's instruction did not comply with McCormick and Evans. "[A]n explicit promise by a public official to act or not act is an element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect." The failure to charge the jury "as to the necessity of finding an explicit promise" was fatal to the conviction.

As the panel concedes, the Sixth Circuit's decision is also contrary to reported decisions of other circuits which extend the quid pro quo requirement to non-campaign contribution cases.

In dicta, the Sixth Circuit noted:

> ...[W]e cannot be certain whether the Supreme Court would have courts apply a different standard when a public official's acceptance of payments that are concededly not campaign contributions forms the basis for that official's extortion charge. Indeed, a strong argument could be advanced for treating campaign contributions and non-campaign contribution cases disparately. Campaign contributions, as the McCormick Court noted, enjoy what might be labeled a presumption of legitimacy[]. (p. 23).

The Court went on to note that campaign contributions were similar to Hobbs Act extortion payments in that they "are given with the hope, and perhaps expectation, that the payment will make the official more likely to support the payor's interest".

In the instant case, petitioner Blandford admitted accepting money from McBee, but denied that the money was a bribe, or in any way linked to his position on legislation. As previously noted, both McBee and Blandford testified that McBee had given Blandford gifts of money, meals, and drinks.

Under Kentucky law at that time, such gifts were not illegal. Thus, it was vital to Blandford's defense that the Instruction require a jury to find an agreement (either express or implied) by Blandford to do a "specific official act" in exchange for the money he received.

The Instruction was particularly significant in Blandford's case because of the lobbyist-legislator relationship. Lobbyists, and lobbying, are as much as part of the political landscape as campaign contributions. As the Seventh Circuit noted in United States v. McClain, 934 F.2d 822, 831 (1991), "influence-peddling has become a wide-spread (albeit not universally recommended) art form and ex-officials are sought out and paid to use their influence in the government to achieve their clients' ends". And, like campaign contributions, gifts from lobbyists are generally presented to legislators "with the hope, and perhaps expectation" that the gift will favorably influence the legislator. In a Hobbs Act case, the quid pro quo requirement is essential to distinguish legitimate lobbying from illegal lobbying. It is respectfully submitted that the petitioner's conviction of a Hobbs Act violation for accepting gifts from a lobbyist, where there was no proof of an agreement or quid pro quo, violates petitioner's rights of due process under the law.

Petitioner Blandford further submits that the Court should hear this matter in order to clarify the effect of this Court's decision in Evans v. United States on Hobbs Act prosecutions under color of official right and to resolve the split among Circuit Courts of Appeal. Petitioner Blandford further respectfully submits that the standard of proof in Hobbs Act extortion prosecutions which arise within the context of lobbying is an issue which has not, but should be, specifically addressed by this Court.

2. The Sixth Circuit's Decision Conflicts With H.J., Inc. And A Prior Sixth Circuit Decision Narrowly Interpreting The "Relatedness" Prong Of The Pattern Element, And Also Conflicts With Turkette's Requirement That The Enterprise Be Separate From The Pattern.

In H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), this Court defined a RICO pattern as " ... criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." (at U.S. p. 240). H. J. also requires "continuity" as part of a "pattern", meaning either a "closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." (at U.S. p. 241).

Blandford argued below that the two predicate acts in this instance (Hobbs Act in 1992 and mail fraud in 1987) do not meet this Court's definition of a "pattern". These acts did not involve the same or similar purposes, results, participants, victims or other methods of commission; the only common denominator was Blandford himself.

The "participants" in the 1992 Hobbs Act predicate were John Spurrier and William McBee, both lobbyists, and Blandford, who was targeted by them because of his status as Speaker of the Kentucky House of Representatives. The alleged "victim" was Riverside Downs, a harness racing track. The mail fraud predicate was based on Blandford's alleged misuse of campaign funds from his House District 14 campaign treasury in June 1987. The purported "mail fraud" involved Blandford, Buel Guy and Gail Foley as participants, while the "victims" were Blandford's campaign contributors. There is a complete disparity

between the participants, victims, purpose, methods and results of the two predicate acts.

The Second Circuit in United States v. Long, 917 F.2d 691, 697 (2nd Cir. 1990) held that RICO predicate acts must relate not only to one another as a "pattern", but must also relate to the "enterprise". Blandford challenged the relationship of either predicate act to the enterprise charged, the "Office of House District 14 together with the individuals employed therein". The testimony (including that of the government's key witnesses, John Spurrier and William McBee) established that the alleged Hobbs Act conduct in 1992 involved Blandford's position as Speaker of the House. Although a political "office", this position had no campaign fund and was not subject to campaign finance laws. The mail fraud predicate involved Blandford's position as treasurer of his campaign fund, which Kentucky law regulated for all "candidates" regardless of whether they even held office. Neither predicate act affected the "enterprise" of the "Office of House District 14".

Blandford further challenged the "enterprise". This Court held in United States v. Turkette, 452 U.S. 576, 583 (1981), that the enterprise must be proven to be:

> ...an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

As this Court further noted, the enterprise must be proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit". Id. The testimony established that the "Office of House District 14" was not a physical entity, nor were there any individuals employed or associated with this office other than Blandford himself. John Spurrier and William McBee were paid lobbyists; Buel Guy and Gail Foley were employees of the

Kentucky Legislative Research Commission, assigned to assist Blandford in his capacity as Speaker of the House. Blandford was the "Office of House District 14".

The government failed to prove the existence of an enterprise separate from Blandford himself. This is directly contrary to this Court's holding in Turkette, and the holdings of several Circuit Courts of Appeal which establish that the "person" charged in a RICO prosecution must be distinct from the RICO "enterprise". See: Fleischhauer v. Feltner, 879 F.2d 1290, 1295 (6th Cir. 1989); and Busby v. Crown Supply, Inc., 896 F.2d 833, 840-41, n. 7 (4th Cir. 1990). See also Guidry v. Bank of LaPlace, 954 F.2d 278, 283 (5th Cir. 1992) and United States v. Benny, 786 F.2d 1410, 1415 (9th Cir. 1986) (sole proprietorship cannot be enterprise).

The United States contended that the "pattern" was Blandford's abuse of his "official" position or office (i.e., the "enterprise") for his private benefit, but carefully avoided identifying the specific office or position to which it was referring. The United States further maintained that "continuity" was established by Blandford's alleged misuse of his public office on more than one occasion. The crux of the government's position was that proving the predicate acts was sufficient to prove all elements of both the "pattern" and the "enterprise". The assumption that two predicate acts necessarily establish a pattern - relied upon by both the United States and the trial court - is inconsistent with this Court's comments in H.J. Inc. v. Northwestern Bell, 492 U.S. 229, 236 (1989) ("... nor can we agree with those courts that have suggested that a pattern is established merely by proving two predicate acts ...").

On appeal, the Sixth Circuit upheld the sufficiency of the government's proof on both the RICO "enterprise" and the pattern of racketeering activity. As to the "enterprise", the Sixth Circuit noted Blandford's contention that the "Office of the

Representative for House District 14" was not a physical or legal entity, but nonetheless found that an "enterprise" existed:

> Even if we were to assume that Blandford was not in charge of a formal and legally cognizable entity, however, this would not be dispositive of the existence of a RICO enterprise. [citations omitted]. Under §1961(4), "associations in fact" also are deemed enterprises. The operation headed by Blandford in the instant action represents just such an enterprise. [citations omitted]. The district court and recognized as much when it ruled that: '[t]he evidence was clear that the defendant had several employees in his office who performed constituent services for both his constituents as Speaker of the House and his constituents as Representative for the Fourteenth District. These employees performed various duties for the office[10] which constituted the enterprise, including some of the racketeering acts. The evidence supported the jury's conclusion that an enterprise existed'. (Opinion, p. 37).

The Sixth Circuit's ruling ignored that the indictment did not charge an "association in fact". Further, although both the trial court and the Sixth Circuit reference Blandford's "employees" (clearly meaning Buel Guy and Gail Foley), neither of these employees "participated" in the alleged Hobbs Act conduct in 1992. Assuming arguendo that Blandford, Foley and Guy could constitute an "association in fact" enterprise for

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[10] The trial court herein also failed to specify the "office" to which it referred.

purposes of the mail fraud predicate, the government still failed to prove that the Hobbs Act conduct in 1992 related to this "enterprise".

The Sixth Circuit panel (Judge Quist dissenting) also upheld the sufficiency of the RICO pattern, holding:

> The relationship requirement is satisfied if the predicate acts 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are related by distinguishing characteristics and are not isolated events'. H. J. Inc., 492 U.S. at 240 (emphasis added). The Supreme Court's use of the disjunctive suggests that the Court meant to craft a broad test of relatedness. See Vild, 956 F.2d at 571 (Guy, J., dissenting)(noting that the "disjunctive indicates that the relatedness requirement is met if the predicate acts are the same or similar in any of the enumerated ways[]"). In light of this test, we conclude that the predicate acts in dispute here were sufficiently related. They had as their purpose the use of public office for personal benefit, and they, in fact, resulted in such benefit[]. (Opinion, 38).

Writing for the majority, Judge Guy cited his dissent in Vild v. Visconsi, 956 F.2d 560, 571 (6th Cir.) cert. denied 113 S. Ct. 99 (1992) for the proposition that this Court meant to create a "broad test" of relatedness. Relying on "otherwise interrelated by distinguishing characteristics," Judge Guy held that the predicate acts here were related because "they had as their purpose the use of public office for personal benefit, and they, in fact, resulted in such benefit." (**Id.**) Implicit in this language

is that the predicate acts did not meet **any** of H.J., Inc.'s other definitions of "relatedness."

Judge Quist dissented because the predicates were "widely separated in time" and "the means of commission, the victims, and the results are dissimilar." (Opinion, 64). Judge Quist further stated that: "The purpose can be described as the same only if it is described on a very general level as the use of public office for personal benefit...[T]his general level of description is an insufficient basis for relatedness because almost every act of fraud or misuse of funds can be described as for this same general purpose - for personal benefit". (Opinion, p. 64). Judge Quist specifically noted that "Blandford's post-election use of excess campaign funds to award an assistant did not involve misuse of the power of his office. The fact that Blandford used campaign funds instead of some other fund entrusted to him was incidental to the act."

In Vild, the majority panel rejected the "broad test of relatedness" that Judge Guy cited in his dissent. Referring to Banks v. Wolk, 918 F.2d 418 (3d Cir. 1990) as a "very liberal version of this test", the Vild panel rejected it in favor of a "more narrow[]" interpretation of the H.J. relatedness requirement. Vild at 568.

The Vild panel also rejected Judge Guy's specific application of his "broad test" in that case - that a "pattern" could rest on only one factor ("same participants" in some schemes) where the other H.J factors were not met. Citing H.J., Inc., the Vild panel determined that the "two types of conduct [presented] have distinct and dissimilar 'purposes, results, participants, victims, or methods of commission.'" (p. 566).

The Blandford panel elevated the Vild dissent to the law of the case and de facto overruled Vild. This has created confusion not only within the Sixth Circuit, but outside that Circuit as well since **Vild** as been cited as having "narrowly

construed the relationship prong" of the RICO pattern. See: United States v. Childers, 18 F.3d 899,914 (11 Cir. 1994) The Sixth Circuit has separated, and elevated to a life of its own, the nebulous concept "interrelated by distinguishing characteristics" from the more concrete elements of "similar purposes, results, participants, victims." The result is a criminal RICO conviction based on a legal concept that was, in Vild, insufficient to state a civil RICO claim.

Petitioner respectfully submits that he was denied due process of law by his conviction of a RICO offense where the government failed to prove the existence of an enterprise or a pattern of racketeering activity. Blandford respectfully petitions this Court to hear this matter in order to resolve the divergence between the opinion issued by the Sixth Circuit panel herein, and prior decisions of the Sixth Circuit and other circuits.

3. The United States Sentencing Commission Exceeded Its Delegated Statutory Authority By Implementing A Sentencing Guideline Mandating A Fine For "Costs Of Incarceration", An Issue Which Has Divided The Circuits.

At sentencing, Blandford was ordered to pay an offense level fine of $10,000, plus a separate fine, pursuant to U.S.S.G. § 5E1.2(i), of $108,356 for "costs of incarceration and supervision." Blandford argued that §5E1.2(i) was invalid and therefore his fine for costs of incarceration was illegal, relying upon United States v. Spiropoulos, 976 F.2d 155 (3d Cir. 1992). In Spiropoulos, the Third Circuit held that neither 18 U.S.C. § 3572(a) nor 28 U.S.C. § 994 authorized the Sentencing Commission, in promulgating guidelines for fines, to consider the costs of a defendant's incarceration as a factor. Such costs

were not authorized as restitution as they benefited the government and not the "victim". Spiropoulos at 165-166. Spiropoulos rejected United States v. Hagmann, 950 F.2d 175 (5th Cir. 1991); and United States v. Doyan, 909 F.2d 412 (10th Cir. 1990), which upheld §5E1.2(i).

In its opinion, the Sixth Circuit noted that other circuits have upheld § 5E1.2(i). (Opinion. 56). The Sixth Circuit panel declined to address the validity of §5E1.2(i), deeming it "inappropriate" under the circumstances of Blandford's case for the reasons cited in United States v. Carrozza, 4 F.3d 70, 84 (1st Cir. 1993) cert. denied, 114 S. Ct. 1644 (1994), including no objection at sentencing. The Sixth Circuit overlooked that a separate reason listed in Carrozza was the remand of the case. "[O]n remand, Patriarca can argue that a cost of imprisonment fine under § 5E1.2(i) is inconsistent with the Sentencing Reform Act." (4 F.3d at 84).

In Spiropoulos, the question presented was whether the sentence was illegal if the guideline authorizing such a fine was itself invalid. "[I]mposition of an illegal sentence constitutes plain error." United States v. Wainwright, 938 F.2d 1096, 1098 (10th Cir. 1991). The Sixth Circuit did not discuss whether an "illegal" sentence had been imposed.

The recently enacted "Crime Bill" amends[11] by adding to the enabling legislation for the Sentencing Commission the

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[11] Public Law 103-322 (Sept. 13, 1994) amends, in Sec. 20403, 28 U.S.C. § 994 to add a new subsection (y): "The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered. 18 U.S.C. § 3572(a) was also amended to add a provision allowing District Courts to consider the "expected costs to the government of any imprisonment . . ." in determining the amount of any fine.

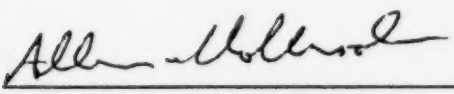
specific authority for the Commission to now consider "in promulgating guidelines" the "expected costs to the government of any imprisonment ...." This amendment supports Spiropoulos's premise that there was no previous statutory authorization for §5E1.2(i), and that the Sentencing Commission previously exceeded its designed authority by imposing fines based upon costs of incarceration. Therefore, Petitioner Blanddford was denied due process by the imposition of an illegal sentence.

As noted above, there is a split between the Third, Fifth, and 10th Circuits as to the validity of Guideline §5E1.2(i). Although the Sixth Circuit upheld Blandford's "costs of incarceration" fine, it did not specifically address the validity of the guideline on which fine was based. This Court should grant certiorari to resolve the conflict between Circuits on this issue.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0312P (6th Cir.)
File Name: 94a0312p.06

No. 93-6011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD J. BLANDFORD,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Kentucky

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Decided and Filed September 7, 1994

Before: NELSON, Circuit Judge; GUY,* Senior Circuit Judge; and QUIST, District Judge.**

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*The Honorable Ralph B. Guy, Jr. assumed senior status on September 1, 1994.

**Honorable Gordon J. Quist, United States District Court for the Western District of Michigan, sitting by designation.

GUY, Senior Circuit Judge, delivered the opinion of the court. NELSON, Circuit Judge (pp. 58-61), delivered a separate concurring opinion. QUIST, District Judge (pp. 62-65), delivered a separate opinion concurring in part and dissenting in part in Judge Guy's opinion, and concurring in Judge Nelson's opinion.

RALPH B. GUY, JR., Senior Circuit Judge. Following a jury trial, defendant was convicted of (1) extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951; (2) racketeering, in violation of the federal RICO statute, 18 U.S.C. § 1962(c); and (3) making false statements to federal investigators, in violation of 18 U.S.C. § 1001. On appeal, defendant challenges these convictions as well as his sentence. For the following reasons, we affirm.

I.

This case arises out of an FBI investigation into public corruption in Kentucky. The investigation, dubbed "Operation BOPTROT," focused on certain members of the Kentucky General Assembly who were suspected of extorting cash payments in exchange for assurances that they would take a particular stance on legislation pertaining to the horse racing industry. Initiated in September 1990, Operation BOPTROT ultimately ensnared several public officials, including Donald J. Blandford, Speaker of Kentucky's House of Representatives. The circumstances that led to Blandford's conviction are as follows.

A. Hobbs Act Violations

At all times relevant to this appeal, Riverside Downs, a harness racing track located in Henderson, Kentucky, cooperated with the FBI. As part of its probe, the FBI directed Riverside Downs to hire John "Jay" Spurrier ostensibly to promote the track's interests in the state

assembly.[1] Spurrier was a logical choice; a prominent lobbyist from Frankfort, Kentucky, he chaired Kentucky's Harness Racing Commission. On Spurrier's advice, Riverside Downs then hired William McBee. McBee, also a lobbyist, was a former state representative who had recently lost a bid for re-election.

An important part of Spurrier's and McBee's work on behalf of Riverside Downs was their effort to stifle any proposed legislation that would restrict the track's ability to simulcast thoroughbred races. In particular, Riverside Downs, like other harness racing tracks, was concerned about the possible enactment of "breed-to-breed" legislation. Under such legislation, race tracks would be able to simulcast only those races involving similar breeds of horses.

Spurrier became aware of Operation BOPTROT after he and McBee had decided to assist Riverside Downs's effort to block any proposed breed-to-breed legislation. Spurrier agreed to cooperate with the investigation and subsequently informed the FBI that Blandford, among others, would be willing to accept money in exchange for his opposition to

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[1]At this time, Spurrier was unaware of the on-going federal investigation. Indeed, Spurrier would not find out about Operation BOPTROT until January 7, 1992, when the FBI confronted him with evidence that he had bribed the governor's nephew, Bruce Wilkinson, with $20,000. Spurrier had made the bribe in connection with a dispute between the Harness Racing Commission and its counterpart, the Thoroughbred Racing Commission, over the allocation of inter-track wagering dates between Riverside Downs and Ellis Park, a nearby thoroughbred track. Pursuant to state law, the dispute was to be referred to an arbitrator selected by the governor. By paying the bribe, Spurrier had hoped to ensure that an arbitrator favorably disposed to Riverside Downs's position would be assigned to resolve the dispute.

breed-to-breed legislation.[2] Spurrier added, however, that

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[2]At trial, as the following exchange from his direct examination reveals, Blandford freely admitted that he had made something of a habit out of accepting cash from lobbyists:

> Q. I believe you were quoted as saying you don't think there is anything wrong with taking money from lobbyists as long as there is nothing, no promises made; is that right?
>
> A. That's, that's pretty accurate, yes.
>
> Q. You said --
>
> A. And again, now, it's in the mind of the beholder, I guess, whether it's wrong, but I think we are talking about what is legal here.
>
> Q. Okay. We, I'm going to get to that in a second. But didn't you say after court the other day to the press, lobbyists can take, or I can take as much money from a lobbyist, it doesn't make any difference, as long as I don't promise anything in return, there is nothing wrong with that. Didn't you say that?
>
> A. I said it's not a bribe.
>
> Q. It's not a bribe?
>
> A. Yes.
>
> Q. Okay, in your mind. And there is nothing wrong with it?
>
> A. No.
>
> Q. As a matter of fact, you did it plenty of times, didn't you?
>
> A. There is nothing illegal [] about it.
>
> Q. And did it plenty of times, took money from a lobbyist when you didn't promise them anything?

Blandford would accept payment only from McBee, who, at the time, was still unaware of the investigation (not to mention Spurrier's complicity). Although the FBI did not immediately attempt to bring McBee into the fold, McBee nevertheless became an unwitting participant, assisting the investigation on at least three occasions by passing FBI money to Blandford.

The first such occasion took place in late January 1992 while various lobbyists, state legislators (including Spurrier, McBee, and Blandford), and their guests were on a trip to Florida. Similar trips, which were financed by various interest groups (the harness racing industry among them), had been taking place on an annual basis for a number of years. Prior to leaving on the trip, Spurrier and McBee discussed the possibility of soliciting, by way of an illegitimate payment, Blandford's assistance in defeating breed-to-breed legislation. To this end, McBee was provided with $500 by Chris Koumas, a Riverside Downs representative who was cooperating with the investigation. Once in Florida, McBee handed the money over to Blandford. In so doing, McBee described the payment as "walking around" money. He did not mention breed-to-breed legislation[3] nor did he tape record what occurred during the transaction. As McBee would later testify, however, Blandford had accepted money from him on at least one prior occasion (in 1990) knowing that the money

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A. Yeah.

Q. From Bill McBee?

A. Yeah.

(Trial Tr., Vol. VIII, at 97-98.)

[3]McBee offered the following explanation for his decision not to broach the subject of breed-to-breed legislation: "I wasn't going to say anything to the Speaker about Riverside Downs until I thought the time was right."

was intended to influence his position with respect to pending horse racing legislation.

The FBI arranged for McBee to make a second payment to Blandford soon after Spurrier, McBee, and Blandford returned from the Florida junket. This time the transfer was to take place during a dinner party to be held at Spurrier's hotel suite in Frankfort. In preparation for the dinner and with court authorization, the FBI set up video and audio surveillance equipment in different parts of Spurrier's suite. The dinner went forward as planned on February 20, 1992. Blandford was not the only general assembly member or guest to attend. Representative Jerry Bronger, among others, also was present. During the course of the dinner, Blandford accepted $500 from McBee in one of the suite's two bedrooms.[4] Once again, however, McBee did not mention breed-to-breed legislation in handing over the cash. He simply stated: "Here's a little something from MR. SPURRIER and me and the harness horse people and . . . so forth." Blandford replied: "All right. Well that's wonderful!"[5]

A second dinner in Spurrier's hotel suite would provide McBee with yet another opportunity to give FBI money to Blandford. Although, at the time, there was no breed-to-breed restriction on simulcasting and inter-track wagering in Kentucky's 1992 horse racing legislation ("horse bill"), the possibility that such a restriction would be added to the horse bill still remained. As industry participants and the FBI were well aware, the horse bill, which was drafted by the governor and submitted to the relevant house committee

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[4]In this particular bedroom, the FBI had set up only audio interception devices.

[5]Later that evening, Bronger accepted his payment, also for $500, in the same bedroom. As he handed over the cash, McBee cautioned Bronger not to say anything to Kenneth Rapier, another state representative attending the dinner, "cause this here is between Donnie [Blandford], you, and me[.]"

on March 2, 1992, could be amended to include a breed-to-breed restriction as late as March 23, 1992.

Again, the FBI obtained court approval to place surveillance equipment in selected spots in Spurrier's suite. On this occasion, the bedroom in which the February 20 dinner payments had occurred was outfitted with both audio and video surveillance devices. Prior to this dinner, which took place on March 11, 1992, Spurrier provided McBee with another $500 to give to Blandford. Spurrier specifically instructed McBee to inform Blandford that the payment was conditioned upon Blandford's opposition to breed-to-breed legislation. Notwithstanding Spurrier's instructions, McBee was only marginally less cryptic than before when it came to informing Blandford about the reason behind the payment. During McBee's and Blandford's conversation, which took place in the bugged bedroom, the following exchange took place:

BLANDFORD: Whatta ya got there? (CHUCKLES)

MC BEE: Another five.

BLANDFORD: Well what is that?

MC BEE: Harness people.

BLANDFORD: Huh?

MC BEE: Your governor's taking care . . . your governor's taking care of the bill.

BLANDFORD: Well, what . . . what . . .

MC BEE: When I get it, I share! (LAUGHS)

BLANDFORD: Hey, bless your heart.

MCBEE: Huh?

BLANDFORD: Bless your heart.

MC BEE: I share with my buddies!

BLANDFORD: Are we all right?

MC BEE: No breed to breed. Ain't in there.

BLANDFORD: (UNINTELLIGIBLE - UI)

MC BEE: Everything's doin' fine. And they're . . . they're not pushing us. I know you hate Riverside but you can't legislate 'em out of business. Let 'em go out of business on their own.

BLANDFORD: Yeah, but we're . . . I mean, we're not . . . we don't have a con . . . . we don't have ah . . .

MC BEE: (UI)

BLANDFORD: Okay . . .

MC BEE: No . . . (UI)

BLANDFORD: MR. BRERETON called me today (UI) . . . that's a helluva horse bill (UI). You fin . . . you finally did right. (UI) I said you don't just throw something out there and say, hey, (UI). I know that now.

MC BEE: And ah no breed to breed, RED MILE stay alive, and then that bunch down there stays alive for a little while but it'll be gone.

BLANDFORD: Yeah. Okay. All right. Thanks.

MC BEE: (UI) my bills. I'll take care of my buddies! (LAUGHS)

Later that evening, Spurrier expressed his gratitude to Blandford:

SPURRIER: Before you get to leavin', I just want to thank you (door closing), for what you've all done really for the harness people I'm dead serious, they've been fair to'em, they've been fair to especially you know my breed to breed problem.

BLANDFORD: Yeah.

SPURRIER: And I really appreciate it DONNIE and I just.

BLANDFORD: Okay.

SPURRIER: I just wanna say thank you.

BLANDFORD: Okay, hey.

SPURRIER: I'm serious.

BLANDFORD: I know, I, I understand and I know.

SPURRIER: And these people have been good and I've embarrassed them, this ITW's about broke'em.

BLANDFORD: Yeah.

SPURRIER: And, and this has kinda got me off the hook.

BLANDFORD: Okay.

SPURRIER: Thank you.

BLANDFORD: Wonderful.

SPURRIER: (UI) I mean you really just been super.

BLANDFORD: Well, just let, let me know.

SPURRIER: I know.

BLANDFORD: That's all you got to do sometime I, sometime I, sometime I may not be quick enough (door closing) to (UI), but . . .

. . . .

SPURRIER: This breed-to-breed thing was just gonna kill us.

BLANDFORD: I know, well . . .

SPURRIER: No I mean just . . .

BLANDFORD: (UI)

SPURRIER: . . . it was [a] personal thing.

BLANDFORD: . . . I know.

SPURRIER: And once we killed that we done good.

BLANDFORD: That's right. It wasn't gonna go, you gotta (UI)

SPURRIER: I know.

BLANDFORD: . . . you know you gotta . . .

SPURRIER: It's fair . . .

BLANDFORD: Okay.

SPURRIER: It turned out.

BLANDFORD: Okay.

SPURRIER: But that don't happen often.

BLANDFORD: Sometimes you know, you, you, you . . . wonder how you're ever gonna get here, through the process but you . . . (UI) bother me until get where you're (UI)

SPURRIER: I just wanna say (UI)

(Government's Trial Ex. # 28.)

B. False Statements to the FBI

Plans to stage a third dinner were held in abeyance when the FBI instead decided to reveal the operation to McBee in hopes that it could then enlist his informed cooperation. When confronted by the FBI on March 30, 1992, McBee, though initially receptive to the agency's overture, refused to assist the investigation. The following day the FBI approached Blandford, himself. Two FBI agents showed up at Blandford's office with a tape recorder and copies of the video and audio tapes of the February 20 and March 11 dinners.[6]

After Blandford consented to the recording of the interview, the agents asked him several times whether he recently had been offered payments in exchange for his position on a piece of legislation. Blandford repeatedly denied that he had received such offers from anyone, including McBee. In fact, he continued his denials even after the agents played the video and audio tapes for him.

C. RICO Violations

The FBI's inquiry into Blandford's affairs was not limited to his conduct with respect to the state's horse

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[6]Blandford contends that the agents disguised their true motive behind questioning him by announcing only that they had "received some allegations concerning public corruption in the State of Kentucky." Blandford adds that the agents waited until mid-way through the interview to "spr[i]ng" the tapes of the previous dinners on him.

racing industry. Indeed, after it had interviewed Blandford, the FBI obtained information regarding Blandford's alleged misuse of campaign funds from Buel Guy, Blandford's chief administrative assistant from 1984 to September 1992. According to Guy, in 1986 Blandford loaned money taken from his campaign account ($3,500) to Patricia Foley, who was at that time Blandford's secretary and girlfriend. Foley used the money for a down payment on a car.

Guy described the way in which Blandford set up the loan. First, Blandford wrote a check drawn on his campaign account to Guy. He then instructed Guy to cash the check and return the money to him. Guy complied, and Blandford turned the money over to Foley. Blandford later explained that since Foley had worked for his campaign during her spare time, "he felt that campaign funds could be used to compensate her for that work." (Appellant's Brief at 10.) Eventually, Guy, on behalf of Blandford, reported the $3,500 check to the Kentucky Registry of Election Finance ("KREF") and the Davies County Clerk, claiming that it represented a reimbursement for campaign-related work.[7] To allay Guy's concern that he would have to pay income taxes on the $3,500, Blandford wrote another check to Guy for $1,018.50. Blandford eventually would offer the same justification for this second check; namely, that Guy, like Foley, had been undercompensated for work on previous campaigns. On January 4, 1988, a report was filed -- apparently through the United States mail[8] -- with the KREF for this check as

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[7]Under Kentucky law, campaign finance reports are to be filed with both the KREF and the county clerk in the candidate's county of residence. Guy testified that ordinarily this was done by sending the reports to the required destinations via the United States mail.

[8]There is some dispute as to whether this report was, in fact, sent through the United States mail. Blandford contests Guy's assertion that the United States mail was the customary means of sending campaign expense reports.

well. Although Guy filled out and signed the report, it was Blandford who gave him the permission and authority to do so. Moreover, Blandford provided Guy with the information to include in the report. Again, the check was designated as reimbursement for a campaign expense.

Based on these facts, a federal grand jury returned an indictment charging Blandford with conspiracy and attempt to commit extortion, in violation of 18 U.S.C. § 1951 (Counts 1 and 2, respectively). The indictment further charged Blandford with a RICO violation. 18 U.S.C. § 1962(c). In this regard, the indictment listed four racketeering acts. While either of the offenses detailed in Counts 1 and 2 accounted for the first such act, acts two through four consisted of three separate instances of alleged mail fraud, each pertaining to Blandford's misuse of campaign funds. Finally, Count 4 charged Blandford with making false statements to FBI agents during his March 31, 1992, interview, in violation of 18 U.S.C. § 1001.

Following a two-week trial, a jury acquitted Blandford of Count 1 and convicted him of Counts 2, 3, and 4. After unsuccessfully moving for a new trial and for a judgment of acquittal, Blandford was sentenced to concurrent terms of imprisonment of 64 months (Counts 2 and 3) and 60 months (Count 4). In addition, Blandford was assessed a $10,000 fine and an additional $108,356 for the cost of his incarceration.

Blandford then filed a motion with the district court requesting a stay of the fine and a release on bail pending his appeal. When the district court denied his motion, Blandford requested the same relief from this court in the form of an emergency motion. Initially, this court stayed the fine for the cost of incarceration upon an appropriate bond and conditions to be determined by the district court. We also temporarily stayed the commencement of Blandford's sentence until September 27, 1993, to allow a full panel of the court to consider the matter. After the district court directed the filing of a bond as to the fine, a

three-member panel of this court declined to grant Blandford release pending this appeal.

II.

A.

On appeal, Blandford mounts several challenges to his Hobbs Act conviction. Title 18 U.S.C. § 1951, which sets forth the definition of "extortion," provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> . . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*.

(Emphasis added).

First, Blandford takes issue with the district court's jury instructions pertaining to Counts 1 and 2 of his indictment. The instructions were in error, he complains, because they did not require the jury to find that he had entered into an explicit agreement (or *quid pro quo*) with Riverside Downs to oppose breed-to-breed legislation. Blandford also argues for the reversal of his extortion conviction on the ground

that the evidence against him was insufficient to support the jury's verdict.

Two decisions of the Supreme Court inform our analysis of these claims. *See Evans v. United States*, 112 S. Ct. 1881 (1992); *McCormick v. United States*, 500 U.S. 257 (1991). In *McCormick*, a West Virginia legislator was convicted of extortion and income tax evasion for accepting cash payments in exchange for his agreement to support legislation furthering the efforts of graduates of foreign medical schools to practice medicine within the state while they attempted to pass the state's licensing exam. The payments, which were deemed campaign contributions, were made by lobbyists who had been retained by the foreign doctors. After receiving several "contributions," the legislator in question made good on his promise by sponsoring legislation that allowed foreign doctors to be permanently licensed -- notwithstanding their failure to pass the state's exam -- by virtue of their years of experience.[9]

The legislator challenged his conviction, arguing that the trial court's jury instructions were flawed because they did

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[9]Earlier, the legislator had sponsored a bill that extended a program permitting foreign doctors to practice while they were attempting to pass the licensing exam.

not contain a *quid pro quo* requirement.[10] The Court agreed and reversed the conviction, stating:

> The receipt of [campaign] contributions is . . . vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.* In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

Id. at 273 (emphasis added); *see also United States v. Bibby*, 752 F.2d 1116, 1127 n.1 (6th Cir. 1985) ("What the Hobbs Act proscribes is the taking of money by a public official in exchange for *specific* promises to do or refrain from doing *specific* things. In other words, there must be a *quid pro quo*.") (citation omitted), *cert. denied*, 475 U.S.

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[10]With regard to the offense of extortion under color of official right, the district court instructed the jury in pertinent part that

> it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime.

McCormick, 500 U.S. at 264 n.4.

The day after this instruction was issued, the jury asked the court for further clarification. The court, in substance, repeated the same instruction, but added that "extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit." *Id.* at 265.

1010 (1986). The Court grounded its decision in a realistic view of the campaign contribution system that we, as a nation, have (for better or worse) adopted. In this regard, the *McCormick* Court observed:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

500 U.S. at 272-73.[11]

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[11] As the Seventh Circuit recently put it:

> *McCormick* recognized several realities of the American political system. Money fuels the American political machine. Campaigns are expensive, and candidates must constantly solicit funds. People vote for candidates and contribute to candidates' campaigns because of those

In *Evans*, the Court granted certiorari to resolve a split in the circuits with respect to one of the questions it expressly declined to address in *McCormick*; namely, whether an affirmative act of inducement on the part of a public official is an element of extortion under color of official right. The defendant in *Evans*, a commissioner of a county in Georgia, accepted campaign contributions totalling $8,000 from an FBI agent posing as a real estate developer. In exchange for the money, the defendant assured the agent-developer that he would do what he could to assist the agent-developer in obtaining rezoning approval for a tract of land. The defendant was not able to perform his end of the bargain, however, because he was arrested before he had an opportunity to do so. In challenging his extortion conviction, the defendant took issue with the jury instructions, which he claimed "did not require the jury to find 'an element of duress such as a demand'"; permitted the jury "to convict him on the basis of the 'passive acceptance of a contribution'"; and "did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution."[12] 112 S. Ct. at 1888-89.

> candidates' views, performance, and promises. It would be naive to suppose that contributors do not expect some benefit--support for favorable legislation, for example--for their contributions.
>
> . . . Because of the realities of the American political system, and the fact that the Hobbs Act's language did not justify making commonly accepted political behavior criminal, the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office--the quid pro quo--be explicit.

United States v. Allen, 10 F.3d 405, 410-11 (7th Cir. 1993).

[12]The district court had instructed the jury as follows:

> The defendant can be found guilty of [18 U.S.C. § 1951] only if all of the following elements are

proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.

Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.

So, if a public official *agrees* to take or withhold official action or [sic] the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.

. . . .

The defendant contends that the $8,000 he received from Agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or *accepts* money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs

The Court, however, rejected the defendant's attack on the jury instructions and affirmed his conviction. The Court ruled:

> We reject petitioner's criticism of the instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick* . . . because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense. We also reject petitioner's contention that an affirmative step is an element of the offense of extortion "under color of official right" and need be included in the instruction. . . . *We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.*

112 S. Ct. at 1889 (footnotes omitted) (emphasis added).

Exactly what effect *Evans* had on *McCormick* is not altogether clear. The federal circuit courts that have considered the matter assume that the former establishes a modified or relaxed *quid pro quo* standard to be applied in non-campaign contribution cases. Under this view, the comparatively strict standard of *McCormick* still would govern when the alleged Hobbs Act violation arises out of the receipt of campaign contributions by a public official. *See United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 249 (1993); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993). These courts evidently assume, without engaging in any rigorous analysis, the validity of their position. The following

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> Act regardless of whether the payment is made in the form of a campaign contribution.

United States v. Evans, 910 F.2d 790, 795-96 (11th Cir. 1990), *aff'd*, 112 S. Ct. 1881 (1992).

passage taken from the Fourth Circuit's decision in *Taylor* is illustrative:

> It is necessary for the prosecution to prove under the *Evans* standard "that a public official has obtained a payment to which he is not entitled, knowing that the payment was made in return for official acts." Or, if the jury finds the payment to be a campaign contribution, then, under *McCormick*, it must find that "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."

993 F.2d at 385 (citation omitted). In short, these circuits have concluded that *Evans*, aside from addressing the question of inducement, also resolved an additional question expressly left unanswered by the *McCormick* Court -- "whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." 500 U.S. at 274 n.10.

We read *Evans* somewhat differently. *Evans*, we believe, merely clarified (1) that no affirmative step towards the performance of the public official's promise need be taken (*i.e.*, fulfillment of the *quid pro quo* is not an element of the offense) and (2) that the *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.*, merely knowing the payment was made in return for official acts is enough). It was important for the Court to provide the former clarification because of a factual discrepancy between the two cases; in *McCormick*, unlike *Evans*, the defendant actually had performed his promise before his arrest. And in the case of the latter clarification, the Court gave content to what the *McCormick quid pro quo* entails. As Justice Kennedy explained in his concurrence:

> The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's

> effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.
>
> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

112 S. Ct. at 1892 (Kennedy, J., concurring). In this sense, then, *Evans* provided a gloss on the *McCormick* Court's use of the word "explicit" to qualify its *quid pro quo* requirement. Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated. Put simply, *Evans* instructed that by "explicit" *McCormick* did not mean "express."[13]

To the extent *Evans* charted entirely new waters, it did so not to differentiate campaign contribution cases from

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[13]That the terms may be distinguished in this manner is borne out by their respective definitions. Black's Law Dictionary defines "explicit" as "[n]ot obscure or ambiguous, having no disguised meaning or reservation. *Clear in understanding.*" Black's Law Dictionary 579 (6th ed. 1990) (emphasis added). "Express," on the other hand, is defined as:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. *Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct.* The word is usually contrasted with "implied."

Id. at 580 (emphasis added).

non-campaign contribution cases, but only to consider the issue on which certiorari was granted, the issue of inducement. Our reading of *Evans* -- as limited to the campaign contribution context -- is bolstered by the fact that the case, after all, involved campaign contributions. Moreover, the majority did not purport to extend its holding beyond the immediate context, nor did the issues before the Court require it to do so. *See United States v. McDade*, 827 F. Supp. 1153, 1171 n.8 (E.D. Pa. 1993) (refusing to apply *McCormick*'s *quid pro quo* requirement in non-campaign contribution case); *but see Evans*, 112 S. Ct. at 1894 ("Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all § 1951 prosecutions.") (Kennedy, J., concurring); *id.* at 1899 (suggesting that the Court extended *McCormick*'s *quid pro quo* requirement to all cases of official extortion) (Thomas, J., dissenting).

Pursuant to our interpretation of *Evans*, we cannot be certain whether the Supreme Court would have courts apply a different standard when a public official's acceptance of payments that are concededly not campaign contributions forms the basis for that official's extortion charge. Indeed, a strong argument could be advanced for treating campaign contribution cases and non-campaign contribution cases disparately. Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy. Although legitimate campaign contributions, not unlike Hobbs Act extortion payments, are given with the hope, and perhaps expectation, that the payment will make the official more likely to support the payor's interests, we punish neither the giving nor the taking presumably because we have decided that the alternative of financing campaigns with public funds is even less attractive than the current arrangement. Conversely, if any presumption is to be accorded to payments that occur outside of the campaign contribution context, the presumption would be the antithesis of the one described above. Stated another way, where, as in this case, a public official's primary justification for receiving, with relative

impunity, cash payments from private sources, *i.e.*, our present campaign financing system, is not available, that public official is left with few other means of rationalizing his actions.[14]

That *Evans* and *McCormick* involved a public official's receipt of campaign contributions does not mean that they are inapposite for our present purposes. For instance, one thing that we do know from *Evans* is that a Hobbs Act conviction for extortion under color of official right will be sustained in campaign contribution cases when the government establishes the existence of a *quid pro quo*, as set forth in *McCormick* and informed by *Evans*. From this proposition, it follows *a fortiori* that in non-campaign contribution cases, which are perhaps less, but clearly not more, difficult to prove from the government's standpoint, the same showing of a *quid pro quo* also would suffice. Additionally, *Evans* approved of this court's decision in *United States v. Butler*, 618 F.2d 411 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980). In *Butler*, a non-campaign contribution public extortion case, we noted the congruence of the crimes of public extortion and bribery. We elaborated:

> Assuming *arguendo*, that Butler's conduct consisted of the mere passive acceptance of a bribe, it is the position of the United States that such conduct, whether the solicitation of, or the mere acceptance of, illicit payments for the desired "official action", was a clear abuse of Butler's office, falling within the proscriptions of the [Hobbs] Act. We agree. Butler's contention that a distinction under the Act is drawn between the voluntary payment of a bribe, and extortion, by way of the

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[14]We do not intend to imply that the receipt of a non-campaign contribution payment is *ipso facto* a Hobbs Act violation. The receipt of such a payment, for instance, would not be actionable where *de minimis* amounts were at stake or where the funds were earmarked for the recipient official's legal defense fund.

> inducement or initiation of such payment, is a technical overdrawn distinction which is in keeping with neither the legislative intent of the statute, nor recent case law holding that in cases of misuse of official power, bribery and extortion are not mutually exclusive.

Id. at 417 (citing, *inter alia*, *United States v. Harding*, 563 F.2d 299 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978)); *see also Evans*, 112 S. Ct. at 1885 (noting equivalence of both crimes at common law).[15]

It is against this backdrop that we evaluate Blandford's challenges to the jury instructions and the sufficiency of the evidence relative to his extortion conviction. The former is easily dismissed. Apparently operating under the mistaken assumption that *Evans* controlled the case at bar, the district court issued an instruction that tracked the relevant portion of the holding in *Evans*, quoting directly therefrom. *See United States v. Coyne*, 4 F.3d 100, 114 (2d Cir. 1993) (rejecting challenge to jury instruction on the basis that "it set out the *quid pro quo* requirement and

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[15] The *Butler* court went on to state

> that the crux of the statutory requirement of "under color of official right" is the wrongful use of one's office to obtain payments. The [Seventh Circuit has] held that "[i]t matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration."

618 F.2d at 420 (quoting *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)).

tracked the Supreme Court's statement in *Evans*"), *cert. denied,* 114 S. Ct. 929 (1994). The court charged:

> [E]xtortion means the obtaining of property, to which one is not entitled, from another with that person's consent, under color of official right. *A public official commits extortion when he obtains a payment to which he was not entitled, knowing that the payment was made in return for his official acts.*
>
> . . . .
>
> *[To find the defendant guilty, the government must prove] that the defendant intended to obtain property or a payment to which he was not entitled with the knowledge that the property or payment was being given in return for an official act or an exercise of his official authority in regard to legislation* potentially including Breed to Breed provisions. As with Count One, the term "property" as used in Count Two means money or other tangible and intangible things of value.

(Emphasis added). Our discussion above should make clear that this instruction, far from prejudicing Blandford, actually inured to his benefit. In effect, the instruction made the government prove a campaign contribution case even though no campaign contributions had in fact been made. *See Garcia*, 992 F.2d at 414 (noting that instruction, which required government to prove inducement, was not objectionable because it imposed an additional burden of proof on the government).

Turning to Blandford's sufficiency of the evidence argument, the issue, as we have framed it, is as follows: Was there sufficient evidence from which a reasonable juror could conclude that Blandford accepted a bribe? Blandford contends that the cash payments he received from McBee during the course of Operation BOPTROT were not in exchange for his official acts. Rather, he claims the payments were given merely as "a gratuity . . . because of [his] status as Speaker." (Reply Brief at 6.) In

reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Judged against the evidence presented, Blandford's position is untenable. It is incontrovertible that Blandford accepted three $500 payments from McBee within a span of three months and that Blandford cannot make any legitimate claim of entitlement to these payments. In our estimation, the evidence (in particular, the transcripts of the taped discussions) further established that Blandford accepted the payments knowing (1) that McBee was a harness race track lobbyist; (2) that the source of the money was "the harness horse people"; and (3) that the Kentucky horse bill, which contained or potentially contained issues of vital importance to the harness racing industry (including breed-to-breed legislation) was pending.[16] From this, a rational juror could have concluded not only that the motivation underlying the payments (*i.e.*, the desire to buy or influence Blandford's vote) was corrupt, but also that Blandford understood he was being paid for his ability to act on this motivation. In other words, a rational juror could have surmised that Blandford accepted the payments despite being aware that his acceptance would engender certain expectations on the part of the payor. *See Coyne*, 4 F.3d at 114 ("[I]t is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence--i.e., on behalf of the payor--as specific opportunities arise.").

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[16]Although the transcripts are admittedly not models of clarity, we again note that, consistent with our reading of *Evans*, an express agreement is not required for a public extortion violation to arise even in a campaign contribution case. Thus, as noted above, in non-campaign contribution cases, the need for a fully articulated *quid pro quo* arguably is diminished to an even greater extent.

In sum, the evidence was sufficient to demonstrate that the "motivation for the payment[s] focuse[d] on the recipient's office." *Butler*, 618 F.2d at 418. Blandford is certainly correct in observing that he was given the money because he was the Speaker of the House; but for the fact that he had the power to influence horse racing legislation, he would not have been offered the payments in the first place. Blandford, however, draws the wrong conclusion from this observation. Rather than insulating him from prosecution, Blandford's acceptance of cash from McBee, under the circumstances, plainly constitutes acceptance of a bribe. The use of public office to benefit one's personal financial status in this fashion is precisely the evil that "under color of official right" extortion was designed to prevent. *Id.* at 420.

Blandford also maintains that Count 2 of his indictment was duplicitous because it contained more than one alleged act of extortion.[17] In this regard, apparently he argues that under Count 2 the jury could have convicted him for extortion without unanimously agreeing that he committed at least one of the listed acts. Blandford's concern, however, was addressed by the district court when it offered the following instruction:

> One more point about count 2. As I have just told you, the indictment accuses the defendant of

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[17] As we explained in *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988):

> A duplicitous indictment is one that charges separate offenses in a single count. The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both. Adverse effects on a defendant may include improper notice of the charges against him, prejudice in the shaping of evidentiary rulings, in sentencing, in limiting review on appeal, in exposure to double jeopardy, and of course the danger that a conviction will result from a less than unanimous verdict as to each separate offense.

> attempting to obtain money from William McBee in exchange for his influence with regard to legislation potentially containing breed-to-breed provisions. The first payment allegedly occurred on January 31, 1992. The second payment allegedly occurred on February 20, 1992. The third payment allegedly occurred on March 11, 1992.
>
> The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of one of these three payments is enough. But in order to return a guilty verdict, all twelve of you must agree that the same one has been proved.

In light of this unanimity instruction, we reject Blandford's duplicity argument. *See United States v. Cherif*, 943 F.2d 692, 701 (7th Cir. 1991) ("The problem Cherif complains about--the possibility that the jury would convict him even though it did not unanimously agree on what false statement he made--could easily have been cured by an instruction telling the jury that it could convict Cherif on the false statement count only if it unanimously agreed on the false statement he made."), *cert. denied*, 112 S. Ct. 1564 (1992).

Blandford further maintains that the district court erred by admitting into evidence the tape recorded statements made by his alleged co-conspirator, Jerry Bronger. Blandford claims that the statements which were made during the February 20 and March 11 dinners were highly prejudicial to his defense because they "show an express *quid pro quo* between [McBee's] payment of the money and Bronger's help in killing breed-to-breed." (Appellant's Brief at 20.)

"In order to admit the statement of a co-conspirator under Fed.R.Evid. 801(d)(2)(E), it must first be determined that the conspiracy existed, that the defendant was a member of the conspiracy, and that the co-conspirator's statements were made 'in furtherance of the conspiracy.'" *United States v. Gessa*, 971 F.2d 1257, 1261 (6th Cir.

1992) (en banc). Each element must be proved by a preponderance of the evidence, and we review the district court's determinations for clear error. *Bourjaily v. United States*, 483 U.S. 171, 176 (1987).

Here, Blandford does not deny that, at least as between McBee and Bronger, a conspiracy to extort existed; nor does he deny that Bronger's statements furthered the conspiracy. Instead, he contends that he was not, himself, part of a conspiracy. The district court rejected Blandford's contention, stating:

> I think that there is evidence [of a conspiracy] on the boat trip; I think that [Blandford] took money or knew the trip and the money and everything that was coming from McBee was from the harness people. And there's a bill deal involved with the harness people, and it was in his capacity as a legislator. So he conspired at least with Mr. McBee to do this, to take money.
>
> Now further, on the preceding tape or the tape prior to this, the one that's on the videotape, McBee tells Blandford [at the February 20 dinner], 'I am going to take care of Bronger next. Is that okay with you,' and Don says, 'Fine.'
>
> Now that indicates that there is an understanding amongst McBee and Blandford that Bronger is going to get some money for doing something, too.
>
> Now if this doesn't look like a conspiracy to influence a legislator for some reason other than in his official business, for his official actions, I don't know if I've ever seen one.
>
> This statement that they're going to make now is in furtherance of what was previously done, what was told on the boat trip, according to the evidence the United States has offered, that this whole thing is for the harness people, and Riverside Downs is harness people.

In light of this analysis, we are persuaded that the district court did not clearly err by admitting the disputed statements.[18]

Blandford also claims the court erred by expanding the scope of the conspiracy as well as its intended victim beyond the particular conspiracy offense detailed in his indictment. Specifically, Blandford asserts that the court transformed the conspiracy from one to prevent breed-to-breed legislation into one aimed at the horse bill in its entirety. Moreover, the court, Blandford argues, determined that the targets of the extortion conspiracy were "harness people," not Riverside Downs as provided for in the indictment. By thus mischaracterizing the nature of the conspiracy, Blandford submits the district court not only "allowed the jury to equate legitimate lobbying on the [horse bill] with corrupt lobbying on 'breed-to-breed'" (appellant's brief at 23), but also enabled the government "to unload on the jury a vast amount of evidence that otherwise should have been inadmissible." (*Id.* at 24.)

"A variance occurs when 'the charging terms [of the indictment]' are unchanged, but the evidence at trial proves facts *materially different* from those alleged in the indictment." *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986) (emphasis added). A variance cannot,

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[18]Additionally, as the district court pointed out in its order denying Blandford's motions for a new trial and a judgment of acquittal, the admission of Bronger's statements had little bearing on the jury's ultimate decision. The court noted:

> The jury's verdict by itself defeats the basis for [Blandford's] argument. In order to acquit the defendant on the conspiracy charge, the jury must have given little weight to the co-conspirator statements implicating the defendant in the conspiracy. The court can discern no prejudice to the defendant from permitting these statements to be presented to the jury in the context of the entire body of evidence on all four counts.

(Footnote omitted.)

however, serve as the basis for reversal unless the defendant's "substantial rights" have been affected. *Id.* at 911. "Substantial rights, in turn, are affected only when a defendant shows 'prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions.'" *Id.* The defendant has the burden of proving the existence of a variance and that such variance is "fatal." *Id.*

Based on our review of the record, we are unpersuaded by Blandford's arguments as to a fatal variance. Indeed, as the government correctly observes, Count 1 of the indictment is not as limited in its allegations as Blandford would have this court believe. For instance, Count 1 alleges that Blandford "conspired to obtain property of another" without specifying that Riverside Downs was the only possible source of such property. Because we conclude that a variance has not occurred in the instant case, we need not consider whether and to what extent Blandford's substantial rights have been impaired.

B.

Blandford also challenges his RICO conviction. It is a crime under RICO for

> any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The Supreme Court has set forth the elements that must be alleged in order to state a claim under § 1962(c) as follows: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted); *see also Hofstetter v. Fletcher*, 905 F.2d 897, 901 (6th Cir. 1988).

In his first assignment of error relative to his RICO conviction, Blandford argues that his predicate acts of mail fraud[19] were impermissibly based on an "intangible rights" theory. *See McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Court held that the mail fraud statute, 18 U.S.C. § 1341, is "limited in scope to the protection of property rights." 483 U.S. at 360; *see also United States v. Kerkman*, 866 F.2d 877, 879 (6th Cir.) ("[*McNally*] held that [§ 1341] applies only to schemes or artifices which defraud or attempt to defraud someone or something of money or property."), *cert. denied*, 493 U.S. 828 (1989). As such, the Court determined that the statute "was inapplicable to schemes designed to defraud 'people or the government of intangible rights, such as the right to have public officials perform their duties honestly.'" *Kerkman*, 866 F.2d at 879. Blandford further contests the government's basis for finding fraud in the instant action -- his mishandling of campaign funds. He claims that Kentucky law does not prohibit an elected official from using campaign funds for personal use when that official continues to seek re-election to the same office.

Again, however, Blandford's claims are without merit. As to his assertion that the government relied on an intangible rights theory, we agree with the district court that Blandford "ignores the plain language of the indictment." The court went on to state: "The mail fraud predicates specifically allege that the defendant illegally obtained $6,518.50 from the Campaign Fund and its contributors. This is beyond doubt an allegation that the defendant used the mails to further a scheme to fraudulently obtain money."

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[19]"A conviction for mail fraud requires proof of (1) a scheme to defraud (2) which involves a use of the mails (3) for the purpose of executing the scheme." *United States v. Castile*, 795 F.2d 1273, 1277-78 (6th Cir. 1986). Mailings that are intended to conceal the fraud are considered to be in furtherance of the scheme. *United States v. Lane*, 474 U.S. 438, 451-53 (1986).

Similarly, we reject Blandford's contention that his actions were not proscribed under Kentucky law. Section 121.180(10) of the Kentucky Revised Statutes provides in pertinent part:

> Any unexpended balance of funds not otherwise obligated for the payment of expenses incurred to further a political issue or the candidacy of a person shall, at the election of the candidate or committee, escheat to the State Treasury, be returned pro rata to all contributors or, in the case of a partisan candidate, be transferred to the executive committee of the political party of which the candidate is a member except that a candidate, committee, *or an official may retain such funds to further the same political issue or to seek election to the same office.*

(Emphasis added). Stated simply, we find Blandford's interpretation of this provision untenable. While section 121.180(10) may not by its own terms prohibit the use of campaign funds for personal purposes, it clearly does list four different legitimate uses for such funds.

In this sense, the instant case is readily distinguishable from a case upon which Blandford relies, *United States v. Pisani*, 773 F.2d 397 (2d Cir. 1985). The defendant in *Pisani* successfully argued for the reversal of his mail fraud conviction on the ground that New York law did not prohibit a candidate from using campaign funds for personal purposes. In fact, as the court observed, there was no state statute that in any way limited or regulated the use of surplus campaign funds.[20] Here, on the other hand,

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[20]The *Pisani* court did acknowledge that subsequent to the defendant's indictment the state legislature had passed a statute to address this area of the law. The statute provided that "[c]ontributions received by a candidate or a political committee may be expended for any lawful purpose. Such funds shall not be converted by any person to personal use which is unrelated to a political campaign or the holding of a public office or party position." 773 F.2d at 410.

there does exist a state statute that limits the uses to which excess campaign funds can be put. We consider the four enumerated uses set forth in section 121.180(10) to constitute the entire universe of permissible uses. To be sure, consistent with this provision, an elected official can retain unspent campaign funds, but he may do so only if those funds eventually further the official's re-election effort. Blandford did not use the campaign funds at issue here in connection with a re-election effort, and thus he did not act in accordance with Kentucky law.

Next, Blandford argues that there was insufficient evidence that he foresaw the use of the mail as part of his fraudulent scheme. Blandford's argument, however, is belied by the record. Indeed, even his chief administrative assistant, Guy, testified that Blandford's office would routinely send campaign finance reports to the appropriate state and county offices through the mail. *See Pereira v. United States*, 347 U.S. 1, 8-9 (1953) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."). Moreover, Blandford conceded that he could not have hand-delivered the January 4, 1988, report because he was in Frankfurt with the General Assembly at the time. In short, the evidence, albeit circumstantial, was sufficient to support the jury's determination that the reports at issue had been mailed and that the mailings were essential to the successful fulfillment of the fraudulent scheme.

In his final attack on his RICO conviction, Blandford maintains that the government failed to establish the existence of an "enterprise" and that the predicate acts did not establish a "pattern" of racketeering activity. The

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The court observed that "[h]ad this new provision been in effect during the period covered by Pisani's indictment, we would not hesitate to affirm his convictions here." *Id.*

Supreme Court defined and distinguished these concepts in instructing that

> [i]n order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

United States v. Turkette, 452 U.S. 576, 583 (1981) (citation and footnote omitted); *see also* 18 U.S.C. § 1961(4) (defining RICO "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity").

Here, we are satisfied that the government met its burden of proving both a RICO enterprise and a pattern of racketeering activity. As to the existence of an enterprise, Blandford contends that the "Office of the Representative for House District 14 together with the individuals employed therein" is not, in fact, an "enterprise" within the meaning of 18 U.S.C. § 1961(4). He points out that

"[t]here was neither a physical entity for the 'Office' for House District 14, nor were there any 'individuals employed therein'." (Appellant's Brief at 31.)

Even were we to assume that Blandford was not in charge of a formal and legally cognizable entity, however, this would not be dispositive of the existence of a RICO enterprise. *See Turkette*, 452 U.S. at 583. Under § 1961(4), "associations in fact" also are deemed enterprises. The operation headed by Blandford in the instant action represents just such an enterprise. *See, e.g., United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) ("A state or local government office or organization may properly be charged as a RICO enterprise."), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Davis*, 707 F.2d 880, 883 (6th Cir. 1983) (holding that county sheriff's office constituted a RICO enterprise where defendants had used the office and their positions therein to secure bribes); *United States v. Thompson*, 685 F.2d 993, 998 (6th Cir.) (holding that reference to "The Office of Governor of Tennessee" as enterprise was permissible under RICO), *cert. denied*, 459 U.S. 1072 (1982). The district court recognized as much when it ruled that

> [t]he evidence was clear that the defendant had several employees in his office who performed constituent service for both his constituents as Speaker of the House and his constituents as Representative for the Fourteenth District. These employees performed various duties for the office which constituted the enterprise, including some of the racketeering acts. The evidence supported the jury's conclusion that an enterprise existed.

A "pattern of racketeering activity" is comprised of "at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity[.]" 18 U.S.C. § 1961(5); *see also Vild v. Visconsi*, 956 F.2d 560, 565 (6th Cir.), *cert. denied*, 113 S. Ct. 99 (1992). To establish such a

pattern, the government must establish not only that at least two predicate acts occurred, but also a "relationship between the predicates" and the "threat of continuing activity[.]" *See H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1988). "'It is this factor of *continuity plus relationship* which combines to produce a pattern.'" *Id.* "Continuity and relationship constitute two analytically distinct prongs of the pattern requirement." *Vild*, 956 F.2d at 566.

The relationship requirement is satisfied if the predicate acts "'have the same or similar purposes, results, participants, victims, *or* methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *H.J., Inc.*, 492 U.S. at 240 (emphasis added). The Supreme Court's use of the disjunctive suggests that the Court meant to craft a broad test of relatedness. *See Vild*, 956 F.2d at 571 (Guy, J., dissenting) (noting that "the disjunctive indicates that the relatedness requirement is met if the predicate acts are the same or similar in any of the enumerated ways[]"). In light of this test, we conclude that the predicate acts in dispute here were sufficiently related. They had as their purpose the use of public office for personal benefit, and they, in fact, resulted in such benefit. In this sense, the acts could be viewed as either sharing similar purposes or results or being "otherwise . . . interrelated by distinguishing characteristics." Again, either characterization would satisfy the broad *H.J., Inc.* test.

In *Vild*, we discussed at length the continuity requirement. Continuity, we remarked,

> "is both a closed- and open-ended concept referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." The plaintiff may prove continuity by showing a series of past related predicates occurring over an extended period of time. A few months period usually is not sufficient. A second means of establishing continuity is to show

> that the predicates, by their nature, "involve a distinct threat of long-term racketeering activity." . . . A third way to prove continuity in this case is to allege "predicates [that] are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate 'RICO enterprise.'"

956 F.2d at 569 (citations omitted) (quoting *H.J., Inc.*). Here, the predicates took place over a period of approximately six years. Moreover, Blandford testified that he saw nothing wrong with putting campaign funds to personal use or with accepting even large amounts of money from lobbyists. Under these circumstances, it is beyond peradventure that Blandford's conduct "project[ed] into the future with a threat of repetition."

C.

Turning to the assignments of error Blandford directs at his conviction under 18 U.S.C. § 1001,[21] we consider first his argument that Count 4 should have been dismissed for its failure to specify the statements supporting the charge. Count 4 stated:

> On or about March 31, 1992, in the Eastern District of Kentucky, Franklin County, Kentucky, in a matter within the jurisdiction of the United States Department of Justice and the [FBI] . . . the

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[21]Title 18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> defendant, **DONALD J. BLANDFORD**, did knowingly and willfully make false, fraudulent, and fictitious material statements and representations to [FBI agents], that is, on or about the above date **DONALD J. BLANDFORD** gave a false explanation for monies he had received from William McBee on February 20, 1992 and March 11, 1992, at the Capital Plaza Hotel in Frankfurt, Kentucky.

Without citing any authority, Blandford urges this court to extend our ruling in a § 1863 perjury case, *United States v. Eddy*, 737 F.2d 564 (6th Cir. 1984), to this § 1001 dispute. In *Eddy*, we stated that "in perjury cases, '[n]o guessing is tolerated [in the drafting of a perjury indictment] and the indictment must set out the allegedly perjurious statements and the objective truth in stark contrast so that the claim of falsity is clear to all who read the charge.'" *Id.* at 567.

"The basic Constitutional standard by which to judge the sufficiency of an indictment is mandated by the Sixth Amendment which requires that the indictment inform the defendant of 'the nature and cause of the accusation.'" *United States v. Piccolo*, 723 F.2d 1234, 1238 (6th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 970 (1984). As we stated in *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), *rev'd on other grounds*, 483 U.S. 350 (1987):

> An indictment provides adequate notice to a defendant "when it permits the defendant to obtain 'significant protections which the guarantee of a grand jury indictment was intended to confer.'" The sufficiency of an indictment is governed by two "preliminary criteria":
>
> > [F]irst, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offense whether the record shows

> with accuracy to what extent he may plead a former acquittal or conviction.'"

Id. at 1296-97 (citing, *inter alia*, *Russell v. United States*, 369 U.S. 749 (1962)).

Notwithstanding the fact that the indictment did not set forth the precise statements made by Blandford, we find the indictment satisfied the principles enunciated in *Gray*. The indictment alleged that Blandford had made material statements that were false or fraudulent and that he had done so knowingly and willfully. It set forth the nature of the statements as well as when and to whom they were made. It also specified that the statements pertained to an activity within the jurisdiction of a federal agency. *See United States v. Steele*, 933 F.2d 1313, 1318-19 (6th Cir.) (en banc) (discussing elements of § 1001 offense), *cert. denied*, 112 S. Ct. 303 (1991). Moreover, a bill of particulars and a revised bill provided Blandford with a more detailed account of the precise statements that supported his § 1001 prosecution. Count 4 of the indictment therefore presented Blandford with adequate notice of the offense for which he was charged.

Blandford further maintains that the evidence against him was insufficient to support the jury's verdict. In reaching its verdict, the jury identified three specific question and answer sequences during which Blandford gave false explanations for his receipt of money from McBee at the February 20 and March 11 dinners. Blandford contests each of the sequences, arguing that his responses were "limited to cash campaign contributions" or merely "flat denials" as opposed to "false explanations." An analysis of Blandford's statements in their greater context, however, undermines both assertions. In other words, not only do the statements pertain to more than simply campaign contributions, but they also were offered to explain (falsely) the reason behind Blandford's acceptance of the funds in question. The jury clearly reached the same determination, one that we see no reason to disturb.

In his final challenge to his § 1001 conviction, Blandford asserts that his statements were not "material" within the meaning of the statute. In *Steele*, we noted that:

> A statement is material for purposes of section 1001 if it has a "natural tendency to influence, or be capable of affecting or influencing," a function entrusted to a governmental agency. It is not necessary to show that the statement actually influenced an agency, but only that it had the capacity to do so. A materiality determination is subject to *de novo* review on appeal.

Id. at 1319 (citations omitted). According to Blandford, "the only claim of 'materiality' the government could muster was [Agent] Whitworth's testimony that he later asked Spurrier whether Spurrier gave $500 to McBee for Blandford." (Appellant's Brief at 34.) Because the government already "had the facts," he adds, the government's investigation was merely inconvenienced, if it was hindered at all.

Again, Blandford's argument is without merit. As the government points out, Blandford prevented the government from inquiring more fully into the question of materiality by objecting during the government's questioning of Agent Whitworth. In fact, defense counsel, after making this objection, told the court: "Your Honor, the question of materiality is yours. There is no reason for the jury to hear that." Subsequently, defense counsel stipulated that Agent Whitworth would have testified that the FBI investigation into Blandford's dealings continued beyond the March 31 interview. Under these circumstances, we find Blandford's contention that his statements were not material, *i.e.*, that they did not have the capacity to influence the investigation, unavailing.

D.

Blandford next asserts that the district court erred by not suppressing the video and audio tapes of the February 20 and March 11 dinners. In particular, Blandford submits

that these tapes should have been sealed immediately after they were made. *See* 18 U.S.C. § 2518(8)(a).

> Under Title III of the Omnibus Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, electronic surveillance may only be conducted pursuant to court order and in a manner consistent with the requirements of Title III. When the government conducts electronic surveillance . . . [18 U.S.C.] § 2518(8)(a) requires that "the contents of any . . . communication intercepted by any means authorized by [Title III] shall, if possible, be recorded on tape or wire or other comparable device." Furthermore, these types of recordings shall be done in such a way as will protect the recording from "doctoring" or alterations. Finally, in order to ensure the integrity of the recording, § 2518(8)(a) also requires that immediately upon the expiration of the period of the order, or extension thereof, such recordings shall be made available to the judge issuing such surveillance order and sealed under his direction. Failure "immediately" to seal a recording pursuant to § 2518(8)(a) can result in the exclusion of the evidence.

United States v. Wilkinson, 26 F.3d 623, 626 (6th Cir. 1994) (citations omitted).

In Blandford's case, Chief Judge William Bertelsman issued orders on February 20, 1992, and March 9, 1992, governing the FBI's surveillance activities for the February 20 and March 11 dinners, respectively. "The February 20, 1992, order provided that interceptions would continue until all communications were intercepted which revealed fully the nature of the criminal activity and its participants, or ten days after the first interception or ten days after the order was entered, whichever was earlier." The March 9, 1992, order, by contrast, "contained the same termination clause, with the provision that the interception would continue for thirty days rather than ten." The tapes of the

February 20 dinner were sealed on March 2, and those of the March 11 dinner were sealed on April 7.

Blandford directs our attention to *Wilkinson*, which involved another prosecution that resulted from Operation BOPTROT. In *Wilkinson*, the defendant argued for the suppression of an audiotape that captured a discussion between himself and none other than Jay Spurrier. The government had secured a court order authorizing electronic surveillance on January 7, 1992.

> [This order] provided that it would expire on the earliest of three dates: (1) the last date on which the government intercepted conversations with the briefcase recording device; (2) fifteen days measured from the first interception; or (3) twenty-five days measured from entry of the order. The order also stated that interception of oral communications must terminate upon the attainment of the authorized objectives, not to exceed fifteen days measured from the day on which the investigative law enforcement officers first began to conduct an interception of this order, or ten days after the order was entered, whichever was the earlier time.

Wilkinson, 26 F.3d at 626-27. Pursuant to this order, the government intercepted the discussion at issue on the day the order was obtained. The government did not attempt to make subsequent interceptions, and the tape was sealed on January 23.

Although the *Wilkinson* court apparently was inclined to accept the defendant's position that the tape should have been sealed consistent with the first option listed in the January 7 order (*i.e.*, "the last day on which the government intercepted conversations"), it remanded the case for further findings. Referencing, among other cases, the Fourth Circuit's decision in *United States v. Suarez*, 906 F.2d 977 (4th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991), the court stated:

> The case discussed hereinabove points out the importance of particular findings and conclusions regarding the circumstances of, and the reasons given for, delay for any period beyond the immediate requirement of sealing under the Wiretap or Omnibus Crime Control Acts. The district court in this case made no such analysis and did not set out clearly its reasons for finding that the sealing in the instant case was timely or objectively reasonable within the meaning of the law. We are troubled, moreover, by the lack of clarity, the gaps, and problems inherent in the tape itself, as well as the purported transcript thereof. Under all these circumstances, we would find it very helpful for appellate review purposes for the district court to set out specifically the reasons for finding that the sealing was timely and its version of the particular "authentic, accurate, and trustworthy" portions of the tape that deal with the vital meeting between Spurrier and the defendant on January 7, 1992.

Wilkinson, 26 F.3d at 628-29.

We do not, however, find *Wilkinson* determinative in this instance. *Wilkinson* differs from the case at bar in at least two significant respects. First, Blandford, unlike his counterpart in *Wilkinson*, does not contend that the tapes, themselves, are of poor quality or lacking in clarity. Second, the district courts in the two cases set forth their reasoning with widely varying degrees of explicitness. For instance, the district court in *Wilkinson* declared simply that "I think that the tapes were properly sealed"; it did not provide "any recitation of authority or further specifications." *Id.* at 627. The court added only that "'[b]oth the admission of tape recordings at trial and a determination of the accuracy of a transcript are within the discretion of this court. *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983).'" *Id.* at 627-28 (footnote omitted). Here, however, the district court was markedly more forthcoming in explaining its decision to reject Blandford's timeliness argument:

> The court has reviewed Chief Judge Bertelsman's orders and concludes that the orders extended for the ten day period in the instance of the first order and for a thirty day period in the second instance. During these periods, Chief Judge Bertelsman received interim status reports from Assistant United States Attorney Walbourn and saw no need to terminate the period. Accordingly, the February 20, 1992 tape was required to be sealed immediately following the expiration of the ten day period. The March 11, 1992 tape was required to be sealed immediately following the expiration of the thirty day period.
>
> The February 20, 1992 tape was sealed on March 2, 1992. This was not immediately following the period set forth in the order. However, the United States has provided a satisfactory explanation for the delay, the defendant has not objected to the delay in sealing from February 29, 1992 to March 2, 1992, and the court can discern no prejudice to the defendant. The March 11, 1992 tape was sealed on April 7, 1992, and was within the time period of the order. These tapes were properly and timely sealed and the motion to suppress will be denied.

Thus, we are not confronted with the same problems that led the *Wilkinson* court to remand. We find the district court's interpretation of Judge Bertelsman's orders to be, if not correct, certainly reasonable, and we see no need to further elaborate on the court's well-reasoned analysis.[22]

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[22]Blandford contests the propriety of the FBI's use of video surveillance. His remark that "audio interceptions, alone, were more than adequate," however, is misguided, for video recording devices were needed in his case to establish that McBee actually had made the disputed payments.

E.

Blandford next takes aim at the government, claiming that the assistant United States attorney who prosecuted his case improperly used evidence of co-conspirator McBee's guilty plea as substantive evidence of his own guilt. *But see United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) (permitting use of guilty pleas as evidence of witness's credibility); *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir.) (same), *cert. denied*, 112 S. Ct. 415 (1991).

In a recently decided case, *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994), this court made clear that the test to be applied in reviewing claims of prosecutorial misconduct is that set forth in *United States v. Bess*, 593 F.2d 749 (6th Cir. 1979).[23] Pursuant to the *Bess* test, we

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[23]The *Carroll* court explained why this clarification was needed: "Since 1976, the Sixth Circuit has applied at least three different tests for determining whether improper remarks by a prosecutor during closing arguments warrant a new trial. To make matters even more confusing, all three tests have been applied within the past two years." 26 F.3d at 1383 (footnote omitted). The two other tests to which the *Carroll* court referred were established in *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976), and *United States v. Thomas*, 728 F.2d 313 (6th Cir. 1984), respectively.

Although the court in *Carroll* observed that *Thomas* and *Bess* are clearly at odds with one another, it did manage to reconcile *Leon* and *Bess*:

> *Bess* and *Leon* can and should be construed in a way that makes them mutually consistent. Both require a two step approach; first we determine whether a prosecutor's remarks were improper, and then we determine whether the impropriety amounts to reversible error. Regarding the second step, the *Leon* test involves four factors:
>
> (1) whether the remarks tended to mislead the jury or to prejudice the accused;
>
> (2) whether they were isolated or extensive;

ask whether the remarks at issue were improper and if so, whether the impropriety amounts to reversible error. With regard to the second step of its analysis, the *Bess* court elaborated: "More commonly . . . the complained-of conduct will not rise to *reversible* error, notably if it is not flagrant, where proof of guilt is over-whelming, where counsel does not object and/or where the trial judge steps in and admonishes the jury." *Id.* at 757. Because we conclude that the remarks Blandford cites were either not

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> (3) whether they were deliberately or accidentally placed before the jury; and
>
> (4) the strength of the evidence against the accused.
>
> The first factor includes consideration of whether the trial judge gave an appropriate cautionary instruction to the jury. *Leon* does not explain how these factors are to be balanced against one another. The second step of the *Bess* test involves three factors, some of which overlap with the *Leon* factors:
>
> > A reviewing court considering improper prosecutorial remarks that are not flagrant is to remand for a new trial if:
> >
> > (1) proof of defendant's guilt is not overwhelming, *and*
> >
> > (2) defense counsel objected, *and*
> >
> > (3) the trial court failed to cure the error with an admonishment to the jury.
>
> *Bess* does not define "flagrant," nor does it instruct what standard one is to apply to flagrantly improper prosecutorial remarks. If we regard the first three *Leon* factors as elucidating the concept of "flagrancy," then the *Bess* test is simply a logical extension of *Leon* that instructs how the four *Leon* factors are to be weighed in situations in which the error is not flagrant.

Carroll, 26 F.3d at 1385-86 (citations omitted).

improper or, if improper, not grounds for reversal, we reject his argument premised on the alleged misconduct of the prosecution.

According to Blandford, the government engaged in misconduct on numerous occasions. The first such occasion occurred during voir dire when the government stated: "You are also going to hear that [McBee has] pled guilty, and he is testifying in this case, and he has a plea agreement . . . ." At this point, defense counsel, arguing that the remark had "tainted the entire pool," moved to quash the entire panel. The government then articulated to the court that its purpose in informing the panel of McBee's plea was "to ask the jury, 'Would you completely ignore anything he had to say simply because of that reason, or would you listen to his testimony.'" Moreover, the government had prefaced its remark by mentioning to the panel that "[McBee's] admission of guilt or his plea of guilty is absolutely not evidence against Speaker Blandford." We are satisfied that, at least as to this incident, the government did not overstep its bounds.[24]

Two other occasions Blandford cites as examples of prosecutorial misconduct occurred during the government's opening and closing arguments. In its opening argument, the government commented:

> But I am telling you now, Jay Spurrier and Bill McBee are no choir boys. Both of them have admitted their participation in criminal activity; both of them are awaiting sentence right now. So I don't want you to think the United States is somehow embracing these guys and loving them and thinking they are somehow great. They did exactly what this

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[24]We are further persuaded that the government properly elicited McBee's guilty plea on redirect. In fact, the district court had expressly authorized the government's line of questioning, noting that defense counsel had challenged the credibility of McBee's testimony.

> man is charged with doing. And that is, engaging in extortion.

In closing, the government, immediately after discussing the credibility of several of its witnesses, reiterated: "I told you up front, Jay Spurrier, Bill McBee are no saints. They are engaged in the same d[e]spicable conduct as Don Blandford and they will be sentenced for that some day. But I don't want you to think for a minute that we're asking you to embrace them."

Blandford failed to object to the government's comments in both instances however and, thus, we review only for plain error. The plain error standard "authorizes the Courts of Appeals to correct only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.) (citing *United States v. Young*, 470 U.S. 1, 15 (1985)), *cert. denied*, 488 U.S. 928 (1988). Far from being "particularly egregious errors," we conclude that the government's remarks during its opening and closing arguments went to the credibility of key witnesses, McBee among them.

The remaining example of alleged misconduct is, as the government concedes, the most problematic. During its direct examination of McBee, the government asked: "And you were also required to plead guilty to a felony offense on the matter arising out of your influencing breed-to-breed legislation, isn't that correct?" McBee responded: "Yes, sir." Upon defense counsel's objection, the court noted that the government had violated a prior court instruction prohibiting the government from inquiring into the specifics of McBee's plea. Even if we were to assume that the government acted improperly in this instance, we still would not conclude that its conduct warrants the relief Blandford seeks. In this regard, we note that the district court substantially cured any prejudice to Blandford by instructing the jury that "[t]hese are matters that you may consider only for determining Mr. McBee's credibility.

And not for determining the guilt or innocence of Mr. Blandford[.]"[25] As the Tenth Circuit has explained:

> "A codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt. . . . If the codefendant testifies, however, either the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the codefendant's credibility as a witness. . . . Because of the potential for prejudice, cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are critical."

United States v. Martinez-Nava, 838 F.2d 411, 416 (10th Cir. 1988) (refusing to grant new trial where district court promptly issued cautionary instructions) (quoting *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983)).

III.

A.

Blandford's assignments of error are not limited to his conviction. Also subject to reversal, he asserts, are several of the district court's sentencing rulings. For instance, he argues that the district court erred by enhancing his offense level under the federal sentencing guidelines for his role in the offense. *See* U.S.S.G. § 3B1.1(c) ("If the defendant was an organizer, leader, manager, or supervisor in any criminal activity . . . increase by 2 levels."). In fact, Blandford maintains that he should have been granted a

---

[25] Later, the court repeated, in essence, its earlier charge:

> You've also heard the testimony of Buel[] Guy, John J. Spurrier, III, and William McBee. You've also heard that before the trial these three men pled guilty to certain crimes. These guilty pleas were brought to your attention only as one way of helping you decide how believable their credibility was. Do not use them for any other purpose. They are not evidence of anything else.

two-level reduction because he was merely a "minor participant" in Spurrier's and McBee's effort to block breed-to-breed legislation. *See id.* § 3B1.2(b) ("If the defendant was a minor participant in any criminal activity, decrease by 2 levels.").

Determining the nature and extent of the role Blandford played in the offense entails a factual inquiry, which we review only for clear error. *United States v. Graves*, 4 F.3d 450, 451 (6th Cir. 1993). Finding no clear error here, we reject Blandford's assertion that he was entitled to the requested reduction. In this regard, we agree with the court's observation that "[i]f anything, he played the major role in the Hobbs Act [offense]." Nor do we disturb the court's decision to enhance Blandford's offense level under section 3B1.1(c). The court correctly determined that Blandford, as his own campaign treasurer, supervised the activities underlying the mail fraud predicate to his racketeering offense.[26]

B.

Blandford also challenges the court's decision to enhance his offense level for obstructing justice. *See* U.S.S.G. § 3C1.1 ("If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels."). In justifying its decision to impose the disputed section 3C1.1 enhancement, the court cited false statements Blandford made to explain his criminal activities. First, the court observed, "Blandford testified that he didn't receive any money or didn't know what he received [from McBee] -- 5, 5,000, 5, 10 -- didn't even know what he

---

[26]Blandford's assertion that Foley was not involved in the mail fraud scheme does not alter our conclusion that a section 3B1.1 enhancement is in order. That at least one other individual was involved, namely, Guy, is sufficient to trigger the enhancement. *See United States v. Kotoch*, 954 F.2d 340, 342 (6th Cir. 1992).

received, said it could have been maybe even fingernail clippers[.]"[27] This testimony, however, was graphically refuted by video tape footage showing Blandford placing $500 dollars into his pocket, removing it, and looking at it. The court surmised: "It's pretty obvious what he was looking at, at least from what I saw, so I think that when he said he didn't know how much money he got . . . I think he misled the jury . . . ." The court also noted Blandford's claim that he gave Guy money from his campaign fund because Guy had worked for it, when, in fact, the money was intended to compensate Guy for incurring tax liability as a result of Blandford's illegitimate loan to Foley. The court correctly determined that in both of these instances Blandford obstructed the administration of justice within the meaning of section 3C1.1.

C.

Blandford's third challenge to his sentence involves the district court's enhancement of Blandford's offense level for his abuse of a position of public trust. *See* U.S.S.G. § 3B1.3 ("If the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels."). As Application Note 1 to section 3B1.3 explains: "For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense . . . ." The court articulated its reasoning behind imposing a section 3B1.3 enhancement in Blandford's case:

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[27]Blandford contends that "this same testimony was the substance of Blandford's March 31 statement in Count 4 . . . which the jury determined was a 'false explanation'. This enhancement constituted both double-counting and multiple punishment." (Appellant's Brief at 43.) Blandford's argument, however, ignores that his interview with the FBI and his conduct at trial independently support, on the one hand, a conviction under 18 U.S.C. § 1001 and, on the other hand, an enhancement under U.S.S.G. § 3C1.1. They are, as the government deems them, "separate incidents occurring at separate times." (Appellee's Brief at 46.)

> [W]e have a position of trust mentioned in which Mr. Blandford was his [own] campaign treasurer, and without -- and that subsumes that the campaign treasurer is going to do things truthfully and file things in a correct fashion. And fortunately, he disbursed campaign funds in a manner not consistent with law and then submitted a report saying that they had been, and that report went through the mail, so I think that that 2-point adjustment is appropriate in this particular circumstance.

Again, although Guy may have been the one actually filling out the reports, he did so only pursuant to Blandford's instructions. Stated simply, the court's conclusion that Blandford abused a position of public trust is not clearly erroneous. *See United States v. Williams*, 993 F.2d 1224, 1227 (6th Cir. 1993) ("The district court's finding regarding the application of section 3B1.3 is a factual finding [reviewed for clear error].").

D.

In his penultimate argument, Blandford asserts that the district court erred by imposing 64-month and 60-month terms of imprisonment for his convictions on Counts 2 and 4, respectively. The applicable sentencing ranges, Blandford maintains, were only 33-41 months for Count 2 and 0-6 months for Count 4. Notwithstanding Blandford's assertion, we find that the district court sentenced him in accordance with U.S.S.G. § 5G1.2, which provides in relevant part:

> (b) Except as otherwise required by law (*see* §5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.
>
> (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences

> on all counts shall run concurrently, except to the extent otherwise required by law.

The Commentary to section 5G1.2 adds that:

> The combined length of the sentences ("total punishment") is determined by the adjusted combined offense level. To the extent possible, the total punishment is to be imposed on each count. Sentences on all counts run concurrently, except as required to achieve the total sentence, or as required by law.
>
> . . . .
>
> Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum and be made to run concurrently with all or part of the longest sentence.

Here, the court properly adhered to the dictates of section 5G1.2. Blandford's adjusted combined offense level was 64 months. "To the extent possible," this sentence should have been imposed on Counts 2 and 4. *See United States v. Newsome*, 998 F.2d 1571, 1581 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994). With regard to Count 4, however, imposing the same sentence was not possible given that the charge contained in the count carries with it a statutory maximum of 60 months imprisonment. The court thus correctly ordered the 60-month sentence to run concurrently with the 64-month sentence imposed on the RICO count. *See id.*

E.

Finally, Blandford advances three arguments to contest the district court's decision to fine him $108,356 for the cost of his incarceration. The court imposed the fine pursuant to U.S.S.G. § 5E1.2(i), which states:

> Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

First, Blandford urges this court to adopt the Third Circuit's holding in *United States v. Spiropoulos*, 976 F.2d 155 (3d Cir. 1992) (holding that section 5E1.2(i) is inconsistent with the Sentencing Reform Act and violates due process); *but see United States v. Turner*, 998 F.2d 534 (7th Cir.) (upholding cost-of-confinement fine against similar challenge), *cert. denied*, 114 S. Ct. 639 (1993); *United States v. Hagmann*, 950 F.2d 175 (5th Cir. 1991) (same), *cert. denied*, 113 S. Ct. 108 (1992). Blandford did not, however, challenge the validity of section 5E1.2(i) at sentencing. In *United States v. Carrozza*, 4 F.3d 70 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1644 (1994), the First Circuit, faced with a similar situation, stated:

> We do not find it appropriate to answer this question at the present time. First, [the defendant] did not object to his cost-of-imprisonment fine at the time of sentencing. Hence, the district court had no reason to focus on the issue, and we lack the benefit of its considered views. Absent plain error, we normally will not consider an issue raised for the first time on appeal. Because the fine issue is one which has divided our sister circuits, we cannot see that the district court's alleged error in assessing the § 5E1.2(i) fine was a "plain" one within the meaning of Fed.R.Crim.P. 52(b).

Id. at 84 (citations omitted). We, too, feel that it would inappropriate, under the circumstances of this case, to consider the validity of section 5E1.2(i).

Second, Blandford maintains that he is incapable of paying the fine. The guidelines place upon the defendant the burden of proving that he is unable to pay a fine.

U.S.S.G. § 5E1.2(f). To bolster his claim, Blandford cites the presentence report, which determined that he had a net worth of $577,278 but a net monthly cash flow of only $8, as well as an accountant's analysis showing that his and his wife's joint total net worth, assuming the accuracy of the report's figures, was less than $150,000. While we acknowledge that Blandford's section 5E1.2(i) fine will create a financial strain for him and his family, once the court determines that the ability to pay does exist, the actual fine imposed "should always be sufficient to ensure that the fine taken together with other sanctions imposed, is punitive." *Id.* § 5E1.2(e). The fine, in other words, should amount to something more than merely a financial "slap on the wrist." Here, we are not persuaded that Blandford has satisfied his burden and, as such, we reject his argument premised on section 5E1.2(f).

In his last challenge to his fine, Blandford accuses the district court of "improperly attributing Blandford's net worth to criminal conduct." (Reply Brief at 24.) To support his accusation, Blandford quotes the following remarks made by the court during his sentencing hearing:

> And to think that giving somebody money to buy drinks, beer, things like that, that accumulates. Maybe that's where all that property came from. And that might answer the question, why would somebody sell out the trust imposed upon him. For financial remuneration is the answer that I think can be developed.

Our review of the court's remarks convinces us, however, that they go to Blandford's motivations and culpability, not his net worth.

For the foregoing reasons, the decision of the district court is **AFFIRMED** in all respects.

DAVID A. NELSON, Circuit Judge, concurring. I concur generally in Judge Guy's very thorough opinion. I write separately, however, to express my understanding of the scope of the *quid pro quo* requirement in extortion cases that do not involve campaign contributions and to discuss the adequacy of the district court's instructions to the jury in this respect.

As I read Justice Stevens' plurality opinion in *Evans v. United States*, 112 S. Ct. 1881 (1992), it leaves little room for doubt that the *quid pro quo* requirement of *McCormick v. United States*, 500 U.S. 257 (1991), is not limited to cases where all of the questionable funds go into the defendant's campaign coffers and none go into the defendant's own pocket. That was certainly Justice Kennedy's understanding: "Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all § 1951 prosecutions." *Id.* at 1894, Kennedy, J., concurring. If this interpretation is correct, we must consider how sharply focused the *quid pro quo* requirement is in a case where, as here, all of the money has gone into the defendant's own pocket. (In *Evans*, it appears, a $1,000 check went to the defendant's campaign fund, and $7,000 given in cash was retained for the defendant's personal use.)

Justice Stevens concluded that the jury instruction at issue in *Evans* satisfied the *quid pro quo* requirement "because the offense is completed at the time when the public official receives a payment in return for his agreement to perform *specific* official acts; fulfillment of the *quid pro quo* is not an element of the offense." *Evans*, 112 S. Ct. at 1889 (emphasis supplied). Summing up, Justice Stevens explained that "[w]e hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* I see no reason to doubt that the "official acts" referred to in the last sentence were the "specific official acts" referred to earlier.

Even outside the campaign contribution context, I take it, the *quid pro quo* requirement can be satisfied only where the payment has been accepted in exchange for a "specific" official act or a "specific" requested exercise of official power. That is what the district court told the jury in *Evans* ("if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance . . . constitute[s] a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution," *id.* at 1884), that is what the Eleventh Circuit held in affirming Mr. Evans' conviction ("passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power," *id.*, quoting 910 F.2d 790, 796 (11th Cir. 1990), and that is what Justice Stevens clearly had in mind when he wrote that "the offense is completed at the time when the public official receives a payment in return for his agreement to perform *specific* official acts . . . ." *Id.* at 1889 (emphasis supplied).

In the case at bar, the defendant tendered a proposed jury instruction stating, among other things, that "[a]s used in these instructions 'wrongfully obtaining property from another . . . under color of official right' means that Mr. Blandford knowingly and deliberately agreed to accept property from Mr. McBee or others . . . in return for Mr. Blandford's promise to perform or not perform *specific* official acts or actions regarding proposed breed to breed legislation." (Emphasis supplied.) The instructions ultimately given by the district court omitted the word "specific." I believe it would have been preferable to include that term.

When given an opportunity to comment on the instructions drafted by the court, however, counsel for defendant Blandford did not make an issue of the court's omission of the word "specific." Counsel argued that *McCormick* and *Evans* require the government "to prove as

a part of its case that mon[ey] or property . . . was given in exchange for an agreement or promise to perform or refrain from performing *some official act*" (emphasis supplied), but in this context I see no meaningful difference between "some official act" and "an official act," the formulation adopted by the court. It was not plain error to omit the word "specific," and viewed in the context of the trial as a whole I am satisfied that any error was harmless.

I am strengthened in my conclusion on the latter point by the government's closing argument, given immediately after the court's delivery of its instructions to the jury. The government argued that money had been given to Mr. Blandford in connection with a specific piece of legislation affecting the harness industry -- House Bill 749, as proposed by the Governor -- and that defendant Blandford had to know that the money was being given to him in exchange for the absence of a breed-to-breed provision in that particular piece of legislation. (At the time the last payment was accepted, the record indicates, it would still technically have been possible for the thoroughbred interests to procure an amendment to the Governor's bill adding the kind of breed-to-breed provision feared by the harness racing interests.)

In its opening statement to the jury, moreover, the government had explained that "[e]xtortion, as it is used in this trial, occurs when a public official, Mr. Blandford, accepts money to which he's not entitled, knowing that it is being given to him in exchange for a *specific* piece of legislation or a *specific* influence he can have." (Emphasis supplied.) The jury was told at the very outset that "this is what the United States is going to prove: Extortion, accepting a payment, knowing it's in return for a *specific* act." (Emphasis supplied.)

The government returned to this theme in the rebuttal that followed the defendant's closing argument. The government argued in rebuttal that Mr. Blandford received the money for a piece of legislation -- House Bill 749 -- that potentially could have included a breed-to-breed

provision, but did not in fact have such a provision. "And," the government told the jury, "he acknowledge[d] I took that money and I knew it was for the governor's bill."

I am satisfied that the jury was not misled, and I believe that keeping a breed-to-breed provision out of the Governor's bill, or ostensibly standing ready to try to do so, would be specific enough to satisfy the requirements of *McCormick* and *Evans*. Although I think that the omission of the word "specific" from the jury charge was unfortunate, I concur in the court's conclusion that a new trial is not required.

GORDON J. QUIST, District Judge, dissenting. I concur in all respects except one with the opinion of Judge Guy and the concurring opinion of Judge Nelson. My sole dissent goes to what is required to establish a "pattern" for purposes of RICO.

The Supreme Court spelled out what was required to establish a pattern for purposes of RICO in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Surveying the legislative history, the Court said:

> A pattern is not formed by "sporadic activity," and a person cannot be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses. Instead, the term "pattern" itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern.

Id. at 239 (emphasis in original) (internal quotations and citations omitted). The Court turned to 18 U.S.C. § 3575(e) for a definition of what is required to show that predicate acts were related: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. Continuity can be show by either "a closed period of repeated conduct, or . . . past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

In attacking his RICO conviction, Blandford argues that the two predicate acts--the Hobbs Act conviction and the mail fraud--do not constitute a "pattern" sufficient to support a RICO conviction. Although Blandford argues that neither continuity nor relatedness were shown, the acts themselves and Blandford's comfort with using his office for personal ends suggest a threat of repetition. I thus agree with the majority opinion on the issue of continuity.

My only disagreement is on the issue of the relatedness of the two predicate acts.

In *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 99 (1992), this Court held that the pattern requirement was not satisfied in a RICO complaint involving Florida real estate because the two series of actions outlined in the complaint were not sufficiently related to each other. The first of the two involved a scheme to defraud plaintiff John Vild by allegedly inducing him to enter into a real estate marketing venture for a Florida resort club and then attempting to force him out of business. *Id.* at 563. The second scheme involved alleged illegal solicitations that certain defendants made to induce customers to purchase interests in the club. *Id.* The court held that the two schemes had very different purposes, disparate results, different victims, and different means of commission. It also held "[t]hat some of the same participants engaged in both lines of conduct does not alter our conclusion that the predicate acts in the two schemes are unrelated." *Id.* at 568.

The dissent in *Vild*, like the majority in the case at bar, pointed out that the *H.J. Inc.* definition of relatedness used the disjunctive, which "indicates that the related requirement is met if the predicate acts are the same or similar in any of the enumerated ways." 956 F.2d at 571. The dissent concluded that the two schemes were related because they had the same participants--some of the defendants were involved in both schemes. *Id.*

In this case, the majority holds that Blandford's conviction under RICO is supported by a pattern in that both actions--accepting money for influencing legislation and converting campaign funds to personal use--are related in that they had as their purpose the use of public office for financial gain. The government charged Blandford with four predicate acts--the Hobbs Act violation, in which Blandford took money for himself, and three acts of mail fraud, all of which involved the use of campaign funds to award Blandford's assistants. If the jury had based its

RICO conviction on more than one of the acts of mail fraud, there would be no question that the acts were related.

The jury, however, determined that only the Hobbs Act violation and one of the mail fraud allegations had been proved by a preponderance of the evidence. These acts are widely separated in time. In addition, the means of commission, the victims, and the results are dissimilar. The purpose can be described as the same only if it is described on a very general level as the use of public office for personal benefit. It cannot even be described as the use of public office for financial gain in that the mail fraud act provided Blandford's assistant, not himself, with financial gain. This general level of description is an insufficient basis for relatedness because almost every act of fraud or misuse of funds can be described as for this same general purpose--for personal benefit.

And I cannot conclude that there should be a different analysis because Mr. Blandford used a *public* office, as distinguished from, for example, a private company, to commit his criminal acts. This is not to say that misuse of public office can never provide the basis for finding criminal acts to be related. In this particular case, Blandford's post-election use of excess campaign funds to award an assistant did not involve misuse of the power of his office. The fact that Blandford used campaign funds instead of some other fund entrusted to him was incidental to the act. If, in addition to the Hobbs Act conviction, he had committed another act in which misuse of public power or position is an essential component, like election fraud or a second Hobbs Act violation, I would consider the acts related.

The question, it seems to me, is whether the criminal acts are related as distinguished from whether the vehicle for achieving those acts is the same. If all that is required is the same vehicle for the wrongful acts, i.e. the same defendants and a very general description of purpose, RICO's criminal charges and treble damages can be

brought into play against any individual or company that engages in two entirely different fraudulent schemes. *See Menasco, Inc. v. Wasserman*, 886 F.2d 681, 685 (4th Cir. 1989) ("If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim"). This result would disregard the *H.J. Inc.* holding that "[a] pattern is not formed by 'sporadic activity,' and a person cannot be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses." 492 U.S. at 239. Accordingly, I respectfully dissent.

APPENDIX B

No. 93-6011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	ORDER
DONALD J. BLANDFORD,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BEFORE: GUY and NELSON, Circuit Judges; and QUIST,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the

suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Quist would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation

Supreme Court, U.S.
FILED
APR 11 1995
OFFICE OF THE CLERK

No. 94-1295

In the Supreme Court of the United States

OCTOBER TERM, 1994

DONALD J. BLANDFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury was properly instructed on the charge of extortion under color of official right (18 U.S.C. 1951).

2. Whether the evidence was sufficient to support petitioner's RICO conviction for participating in the conduct of the affairs of an "enterprise" through "a pattern of racketeering activity" (18 U.S.C. 1962(c)).

3. Whether the sentencing court committed plain error by imposing a costs-of-incarceration fine under Sentencing Guidelines § 5E1.2(i).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1295

DONALD J. BLANDFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-65a) is reported at 33 F.3d 685.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1994, and a petition for rehearing was denied on December 1, 1994. Pet. App. 1b-2b. The petition for a writ of certiorari was filed on January 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); and of making false statements to a federal agency, in violation of 18 U.S.C. 1001. The district court sentenced petitioner to a 64-month prison term, to be followed by two years' supervised release. Pet. App. 13a. The court of appeals affirmed. *Id.* at 1a-65a.

1. Petitioner is the former Speaker of the Kentucky House of Representatives. The trial evidence showed that petitioner received three separate cash payments of $500 each within a three-month period from William McBee, a lobbyist for Kentucky harness racing interests. The trial evidence also showed that petitioner used campaign funds to provide his girlfriend with the down payment for a car and that he falsely described a related payment in a campaign finance report filed through the United States mail. Pet. App. 2a-13a.

Petitioner received the first $500 cash payment from McBee in January 1992 while in Florida on an interest-group financed trip. McBee had been hired as a lobbyist by Riverside Downs, a harness racing track in Henderson, Kentucky. Riverside, like other harness tracks, was concerned about possible enactment of "breed-to-breed" legislation that would have restricted the simulcasting of races to tracks that race similar breeds of horses. Riverside was

cooperating in an FBI undercover investigation, dubbed Operation BOPTROT, of Kentucky legislators suspected of extorting cash payments in return for taking a position on racing legislation. Although Riverside officials were informed of the undercover investigation, McBee was not. When McBee provided petitioner with the first $500 cash payment on behalf of Riverside, he described it as "walking around" money and did not mention the breed-to-breed legislation. McBee later testified at trial, however, that petitioner had accepted money from him on at least one prior occasion knowing that it was intended to influence his position on pending horse racing legislation. Pet. App. 2a-6a.

Petitioner received the second $500 cash payment on February 20, 1992, in a bedroom of a hotel suite rented by "Jay" Spurrier, a Riverside Downs lobbyist who by then was cooperating in the FBI undercover investigation. The transaction was recorded by an audio reception device hidden in the bedroom. McBee again failed to mention the breed-to-breed legislation, but he did make clear that the cash was "a little something from Mr. Spurrier and me and the harness horse people and . . . so forth." Pet. App. 6a. Petitioner replied: "All right. Well that's wonderful!" *Ibid.*

Petitioner received the third $500 cash payment on March 11, 1992, again in Spurrier's hotel suite. The Kentucky governor's proposed horse racing legislation had been submitted to a legislative committee on March 2, 1992, but could have been amended as late as March 23, 1992 to include a breed-to-breed restriction. Pet. App. 6a-7a. This time, the FBI captured the payment and related discussions on both video and audio tape. McBee told petitioner he had

"[a]nother five" from the "[h]arness people"; he told petitioner that "your governor's taking care of the bill" and added, with reference to the cash, that "[w]hen I get it, I share!" Pet. App. 7a. Petitioner replied, "bless your heart." *Ibid.* McBee then said: "No breed to breed. Ain't in there." *Id.* at 8a. After further discussion regarding the horse bill, McBee repeated his "no breed to breed" point, and petitioner responded: "Yeah. Okay. All right. Thanks." *Ibid.* Later that same evening, Spurrier expressed his gratitude at length to petitioner on behalf of "the harness people" with respect to the "breed to breed problem." *Id.* at 9a.

The evidence also showed that petitioner filed at least one false campaign finance statement through the United States mail. Buel Guy, petitioner's chief administrative assistant from 1984 until 1992, testified that in 1986 petitioner loaned $3500 from his campaign account to Patricia Foley, his then-secretary and girlfriend, to be used as down payment on a car. Petitioner funneled the money to Foley by writing Guy a campaign account check, which Guy cashed and returned to petitioner. The check was reported to the Kentucky Registry of Election Finance and the local clerk in petitioner's county of residence as reimbursement to Guy for campaign work. To allay Guy's concern that he might have to pay taxes on the $3500, petitioner issued Guy another campaign check, this time for $1018.50, which again was listed as reimbursement for a campaign expense. The report describing that payment was filed on January 4, 1988, through the United States mail. Pet. App. 11a-13a.

On March 31, 1992, the undercover phase of Operation BOPTROT ceased, and FBI agents went to

petitioner's office in Frankfort, Kentucky, to question him about payments he received from McBee. During a consensually recorded conversation, petitioner repeatedly denied having received money on any occasion from McBee. These false statements gave rise to petitioner's conviction under 18 U.S.C. 1001. Pet. App. 11a, 13a; Gov't C.A. Br. 9-10.

2. The court of appeals affirmed. Pet. App. 1a-65a.

a. The court of appeals held that the district court properly instructed the jury regarding the Hobbs Act offense of extortion "under color of official right" (18 U.S.C. 1951). Pet. App. 14a-28a. The court first rejected petitioner's claim that the instructions erroneously failed to "require the jury to find that [petitioner] had entered into an explicit agreement (or *quid pro quo*) with Riverside Downs to oppose breed-to-breed legislation." *Id.* at 14a. After thoroughly analyzing this Court's opinions in *Evans* v. *United States*, 112 S. Ct. 1881 (1992), and *McCormick* v. *United States*, 500 U.S. 257 (1991), the court of appeals found it significant that those cases, unlike this one, involved campaign contributions. See Pet. App. 15a-23a. The court of appeals was "[un]certain whether the Supreme Court would have courts apply a different standard when a public official's acceptance of payments that are concededly not campaign contributions forms the basis for that official's extortion charge," *id.* at 23a, but the court thought "a strong argument could be advanced for treating campaign contribution cases and non-campaign contribution cases disparately" because "where, as in this case, a public official's primary justification for receiving, with relative impunity, cash payments from private sources, *i.e.*, our present campaign financing system, is not available, that public official

is left with few other means of rationalizing his actions." *Id.* at 23a-24a.

The court of appeals, however, ultimately found it unnecessary to determine the precise contours of any quid pro quo requirement outside the campaign contribution context because the district court, "[a]pparently operating under the mistaken assumption that *Evans* controlled the case at bar, * * * issued an instruction that tracked the relevant portion of the holding in *Evans*, quoting directly therefrom." Pet. App. 25a. The court emphasized the district court's instructions, which stated that: "A public official commits extortion when he obtains a payment to which he was not entitled, knowing that the payment was made in return for his official acts"; and "[To find petitioner guilty, the government must prove he] intended to obtain property or a payment to which he was not entitled with the knowledge that the property or payment was being given in return for an official act or an exercise of his official authority in regard to legislation potentially including Breed to Breed provisions." *Id.* at 26a (emphasis omitted). The court concluded that "this instruction, far from prejudicing [petitioner], actually inured to his benefit" by effectively requiring that "the government prove a campaign contribution case even though no campaign contributions had in fact been made." *Ibid.*

Judge Nelson concurred in the judgment but wrote separately to express his view that the quid pro quo requirement of *Evans* and *McCormick* was not "limited to cases where all of the questionable funds go into the defendant's campaign coffers and none go into the defendant's own pocket." Pet. App. 58a. Notwithstanding his different view of the import of

Evans and *McCormick*, Judge Nelson concluded that the district court's instructions adequately encompassed the notion of a quid pro quo. See *id.* at 58a-61a. While he believed that it would have been "preferable" to instruct the jury that petitioner must have known the payment was in exchange for a "specific" official act, petitioner had failed to object to the omission of that one word and the omission did not amount to plain error. *Id.* at 59a-60a.

b. The court of appeals affirmed petitioner's RICO conviction. Pet. App. 32a-39a. In convicting petitioner, the jury returned a special verdict indicating it had found that petitioner committed the predicate racketeering acts of (1) extortion (18 U.S.C. 1951) based on the McBee payments, and (2) mail fraud (18 U.S.C. 1341) based on the false campaign report mailed in 1988. Pet. App. 13a, 64a. The court of appeals, with one judge dissenting, held that these two predicate acts constituted the requisite "pattern" of racketeering activity. *Id.* at 35a-39a. The court explained that a RICO pattern requires "not only that at least two predicate acts occurred, but also a 'relationship between the predicates' and the 'threat of continuing activity[.]'" *Id.* at 38a (quoting *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). The court found the predicate crimes in this case to be related because "[t]hey had as their purpose the use of public office for personal benefit, and they, in fact, resulted in such benefit." Pet. App. 38a. And, the court found it "beyond peradventure" that these acts posed a threat of continuing activity, particularly given petitioner's trial testimony "that he saw nothing wrong with putting campaign funds to personal use or with

accepting even large amounts of money from lobbyists." *Id.* at 39a.

The court of appeals also found that the government had proved the requisite RICO "enterprise." Pet. App. 36a-37a. The court rejected petitioner's contention that "the 'Office of the Representative for House District 14 together with the individuals employed therein' is not, in fact, an 'enterprise' within the meaning of 18 U.S.C. § 1961(4)." *Id.* at 36a. It explained that, even assuming petitioner "was not in charge of a formal and legally cognizable entity, * * * [u]nder § 1961(4), 'associations in fact' are also deemed enterprises." *Id.* at 37a (citation omitted). The court endorsed the district court's determinations that "[t]he evidence was clear that [petitioner] had several employees in his office who performed constituent service for both his constituents as Speaker of the House and his constituents as Representative of the Fourteenth District" and that "[t]hese employees performed various duties for the office which constituted the enterprise, including some of the racketeering acts." *Ibid.*

c. The court of appeals upheld the judgment imposing upon petitioner a $108,356 fine to cover the expected costs of his incarceration. Pet. App. 55a-57a. The court declined to consider petitioner's challenge to the Sentencing Commission's authority to promulgate the costs-of-incarceration fine guideline (§ 5E1.2(i)) because petitioner "did not * * * challenge the validity of section 5E1.2(i) at sentencing." Pet. App. 56a.

ARGUMENT

1. Petitioner asks (Pet. 12-17) this Court to grant certiorari to consider whether the quid pro quo

requirement recognized in *McCormick* v. *United States*, 500 U.S. 257 (1991), and *Evans* v. *United States*, 112 S. Ct. 1881 (1992), applies outside the campaign contribution context. That question is not squarely presented, however, because the district court, "operating under the * * * assumption that *Evans* controlled the case at bar, * * * issued an instruction that tracked the relevant portion of the holding in *Evans*, quoting directly therefrom." Pet. App. 25a. It is unclear whether a majority of the court below believed the district court was correct in assuming that the quid pro quo requirement should apply to a public official's receipt of cash that concededly cannot be justified as a campaign contribution.[1] The court was not required to resolve that issue in any event, because the district court's instruction effectively required the government to prove the existence of a quid pro quo in order to convict. *Id.* at 26a.

Petitioner takes issue (Pet. 15) with the court of appeals' conclusion that the challenged jury instruction embodied the quid pro quo requirement under *Evans*. The instruction, however, directly tracked this Court's language in *Evans*. Compare *Evans*, 112

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[1] Judge Guy, the author of the majority opinion, viewed *Evans* "as limited to the campaign contribution context" (Pet. App. 23a), and suggested the district court was "mistaken" in assuming otherwise (*id.* at 25a). Judge Nelson, on the other hand, viewed *Evans* as "leav[ing] little room for doubt that the *quid pro quo* requirement of *McCormick* * * * is not limited to [campaign contribution] cases." *Id.* at 58a. The view of the third judge on this point is unclear. See *id.* at 62a (opinion of Quist, J., sitting by designation) ("I concur in all respects except [as to a RICO issue] with the opinion of Judge Guy and the concurring opinion of Judge Nelson.").

S. Ct. at 1889 ("We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.") with Pet. App. 26a ("A public official commits extortion when he obtains a payment to which he was not entitled, knowing that the payment was made in return for his official acts."). A Hobbs Act instruction need not, contrary to petitioner's claim (Pet. 15-17), require a jury to find an "explicit" bribe agreement. *Evans* makes clear that the "explicit promise or undertaking by the official to perform or not to perform an official act" referred to in *McCormick*, 500 U.S. at 273, may be proved by evidence that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans*, 112 S. Ct. at 1889; see also *id.* at 1892 (Kennedy, J., concurring in part and concurring in the judgment) ("The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods.").

The quid pro quo requirement, assuming it applies in the present context, was conveyed not only by the jury instruction tracking the *Evans* holding but also by the related instruction focusing on petitioner's knowledge and intent regarding the linkage between the cash payments and official acts. See Pet. App. 26a (evidence must show that petitioner "intended to obtain property or a payment to which he was not entitled with the knowledge that the property or payment was being given in return for an official act or an exercise of his official authority in regard to legislation potentially including Breed to Breed

provisions"). Petitioner apparently renews his claim that this instruction should have required linkage between the cash payments and a "specific" official act. See Pet. 17. Judge Nelson's concurring opinion agreed the omission of the word "specific" from the instruction was "unfortunate," but concluded that petitioner had failed to bring the alleged error to the district court's attention and that the omission did not, under the circumstances of this case, amount to plain error. See Pet. App. 58a-61a; see generally Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."); *United States* v. *Olano*, 113 S. Ct. 1770, 1776-1779 (1993) (discussing plain error standard). That case-specific issue warrants no further review.

Contrary to petitioner's contention (Pet. 15-16), the court of appeals' conclusion regarding the adequacy of the instructions does not conflict with *United States* v. *Martinez*, 14 F.3d 543 (11th Cir. 1994), or *United States* v. *Davis*, 30 F.3d 108 (11th Cir. 1994) (per curiam). Neither of those cases ruled that the language of the *Evans* holding is insufficient to express the quid pro quo requirement. In *Martinez*, the district court entirely "failed to instruct the jury on the *quid pro quo* requirement," a fact the government conceded. 14 F.3d at 553.[2] In *Davis*, "the

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[2] The instructions defined extortion under color of official right as "the wrongful taking by a public official of money or property not due to him or his office, whether or not the taking was accomplished by force, threats or use of fear." *Martinez*, 14 F.3d at 552. Though another part of the instruc-

district court failed to charge [the] jury as to the necessity of finding an explicit promise before the jury properly could convict—and indeed informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion.'" 30 F.3d at 109.

The Eleventh Circuit did state that "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect." 30 F.3d at 109. *Evans* holds, however, that the "explicit promise or undertaking" requirement of *McCormick*, 500 U.S. at 273, may be proved by evidence that a public official received a payment, "knowing that [it] was made in return for official acts." 112 S. Ct. at 1889; see *id.* at 1892 (Kennedy, J., concurring in part and concurring in the judgment). The statement in *Davis* did not expressly require anything more than what this Court said was sufficient in *Evans*, nor did the court in *Davis* review instructions like those at issue here.

2. Petitioner also challenges (Pet. 18-24) the sufficiency of the evidence underlying his RICO conviction. His case-specific claims were correctly rejected by the court of appeals, and warrant no further review.

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tions did use language similar to that of the *Evans* holding, it did not limit liability to *Evans*-type proof. Rather, the jury was instructed that "passive acceptance of a benefit by a public official is sufficient to form the basis of an extortion violation, if the official knows he had been offered the payment in exchange for the exercise of his official power, *or that such payment is motivated by hope of influence.*" *Ibid.* (emphasis added).

Petitioner claims (Pet. 19-21) that the evidence failed to establish a RICO "enterprise." The court of appeals articulated the correct legal standard on that point, see Pet. App. 36a (extensively quoting *United States* v. *Turkette*, 452 U.S. 576, 583 (1981), and 18 U.S.C. 1961(4)), and petitioner's only challenge is to the court's application of the standard to the facts of this case. The court of appeals correctly rejected petitioner's "conten[tion] that the 'Office of the Representative for [Kentucky] House District 14 together with the individuals employed therein' is not, in fact, an 'enterprise' within the meaning of 18 U.S.C. § 1961(4)." Pet. App. 36a. It explained that, even assuming that petitioner "was not in charge of a formal and legally cognizable entity, * * * [u]nder § 1961(4), 'associations in fact' also are deemed enterprises." *Id.* at 37a (citing *Turkette*, 452 U.S. at 583). The court endorsed the district court's factual determination that "[t]he evidence was clear that [petitioner] had several employees in his office who performed constituent service for both his constituents as Speaker of the House and his constituents as Representative of the Fourteenth District" and that "[t]hese employees performed various duties for the office which constituted the enterprise, including some of the racketeering acts." *Ibid.* These determinations do not conflict with any decision of this Court or of another court of appeals.[3]

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[3] In support of a claimed conflict, petitioner cites several cases (Pet. 20) that may be read for the legal proposition that the RICO enterprise must be an entity separate from the person charged in the RICO indictment. Nothing in the decision below conflicts with that principle; rather, the court of appeals determined, as a factual matter, that the Office of the

Petitioner also claims (Pet. 18-24) that the proof failed to show a "pattern of racketeering activity." Although other racketeering acts were charged, the jury found that petitioner had committed the predicate crimes of extortion in 1992 and mail fraud in 1988. Those predicate crimes support conviction under RICO, which defines a "pattern of racketeering activity" as "requir[ing] at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years * * * after the commission of a prior act of racketeering activity." 18 U.S.C. 1961(5). Again, the court of appeals articulated the correct legal standard, citing a decision of this Court for the requirement that "the government must establish not only that at least two predicate acts occurred, but also a 'relationship between the predicates' and the 'threat of continuing activity[.]'" Pet. App. 38a (citing *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)).

Petitioner's challenges to the court of appeals' determination that the trial proof established the relationship and continuity necessary for a RICO "pattern" warrant no further review. The court correctly explained that "[t]he relationship requirement is satisfied if the predicate acts 'have the same or similar purposes, results, participants, victims, *or* methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" Pet. App. 38a (quoting and adding emphasis to *H.J. Inc.*, 492 U.S. at 240). The court found the predicate acts in this case "sufficiently related"

Representative of Kentucky House District 14, headed by petitioner, was a RICO enterprise. Pet. App. 36a-37a.

because they "had as their purpose the use of public office for personal benefit, and they, in fact, resulted in such benefit." Pet. App. 38a. That determination does not conflict with the decision of any other court of appeals.[4] Likewise, the court of appeals correctly found it "beyond peradventure" that these acts posed a threat of continuing activity, particularly in light of petitioner's trial testimony "that he saw nothing wrong with putting campaign funds to personal use or with accepting even large amounts of money from lobbyists." *Id.* at 39a.

3. Finally, petitioner seeks review (Pet. 24-26) of the court of appeals' determination not to address the merits of his challenge to the validity of Sentencing Guidelines § 5E1.2(i), which provides for imposition of a fine to cover the expected costs of incarceration

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[4] Petitioner's primary claim of conflict is based on the court's alleged "overrul[ing]" (Pet. 22-24) of its prior decision in *Vild* v. *Visconsi*, 956 F.2d 560 (6th Cir.), cert. denied, 113 S. Ct. 99 (1992). The claimed intra-circuit conflict, even if accurate, would not justify certiorari, see *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam), and in fact no conflict exists. Judge Guy quoted his *Vild* dissent for the proposition that the use of the disjunctive in *H.J. Inc.* means that "the relatedness requirement is met if the predicate acts are the same or similar in any of the enumerated ways." Pet. App. 38a (quoting 956 F.2d at 571). The *Vild* majority did not reject that point but, on the contrary, analyzed each factor and concluded none had been satisfied under the particular facts of that case. See 956 F.2d at 566-568. The principal legal dispute in *Vild* was whether the similarity of participants in the predicate acts was sufficient to satisfy the relatedness test. See *id.* at 572 (Guy, J., dissenting). Here, however, the court of appeals did not rely on petitioner's participation in both predicate acts, but rather relied on the similarity of purpose and result. See Pet. App. 38a.

(here, $108,356). Petitioner's claim concededly was not raised in the district court, and the court of appeals held that imposition of a fine pursuant to Guidelines § 5E1.2(i) was not "plain error" reviewable for the first time on appeal. Pet. App. 56a (citing *United States* v. *Carrozza*, 4 F.3d 70, 84 (1st Cir. 1993), cert. denied, 114 S. Ct. 1644 (1994)); see also *United States* v. *Mondello*, 927 F.2d 1463, 1468 (9th Cir. 1991) (refusing to consider challenge to Guidelines fine first raised on appeal). Petitioner can show plain error only if, among other things, it was "obvious" error for the sentencing court not to invalidate Guidelines § 5E1.2(i). *United States* v. *Olano*, 113 S. Ct. at 1777-1778. In view of the case law upholding the validity of that Section, petitioner cannot satisfy the plain error standard. See *Carrozza*, 4 F.3d at 84.

Even if petitioner's challenge had been properly preserved, the issue would not warrant this Court's review. Only one federal court of appeals has invalidated Guidelines § 5E1.2(i), see *United States* v. *Spiropoulos*, 976 F.2d 155, 164-169 (3d Cir. 1992), but that court's reasoning has been specifically rejected by several other courts of appeals, at least five of which have upheld costs-of-incarceration fines imposed pursuant to Section 5E1.2(i). See *United States* v. *Watroba*, No. 93-2600, 1995 WL 82885, at * 2-4 (6th Cir. Mar. 2, 1995); *United States* v. *Orena*, 32 F.3d 704, 716-717 (2d Cir. 1994); *United States* v. *Turner*, 998 F.2d 534, 536-537 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993); *United States* v. *Hagmann*, 950 F.2d 175, 186-187 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992); *United States* v. *Doyan*, 909 F.2d 412, 415-416 (10th Cir. 1990). Moreover, as petitioner notes (Pet. 25 n.11), Congress has now expressly articulated,

through enactment of legislation effective September 13, 1994, the Sentencing Commission's authority to require costs-of-incarceration fines. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20403(b), 108 Stat. 1825 (to be codified at 28 U.S.C. 994(y)) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered."); see also § 20403(a)(2), 108 Stat. 1825 (to be codified at 18 U.S.C. 3572(a)(6)) (sentencing court imposing fine shall consider, among other things, "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence"). The issue, therefore, has little prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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